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Supreme Court of the United States

_____ TERM, 1946.

No. 771.

EDWARD VANCE, APPELLANT,

VS.

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS ET AL., APPELLEES.

PETITION TO THE SUPREME COURT OF THE UNITED STATES OF AMERICA FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI, WESTERN DIVISION.

EDWARD VANCE,
R. 1, Box 191-C,
Independence, Missouri,
Plaintiff-Appellant,
Attorney for Self.

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SEC. 1 (a).

Supreme Court of the United States

.....TERM, 1946.

No. .....

EDWARD VANCE, APPELLANT,

VS.

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS; DEEMS TAYLOR, PRESIDENT; GEORGE W. MEYER, SECRETARY; MAX DREYFUS, TREASURER; SHAPIRO, BERNSTEIN AND COMPANY, INCORPORATED, MUSIC PUBLISHER MEMBER; EDWIN H. MORRIS AND COMPANY, INCORPORATED, MUSIC PUBLISHER MEMBER; JENKINS MUSIC COMPANY, INCORPORATED, MUSIC PUBLISHER MEMBER; MUSIC PUBLISHERS PROTECTIVE ASSOCIATION, OF MUSIC PUBLISHER MEMBERS; MARTIN MELTZER, DISTRICT MANAGER; MAURICE J. O'SULLIVAN, BUSINESS AND LEGAL, DISTRICT REPRESENTATIVE; HUDSON R. MORTON, DISTRICT REPRESENTATIVE; DICK HOWARD, AUTHOR MEMBER; BOB ELLSWORTH, AUTHOR MEMBER; RUSS MORGAN, AUTHOR MEMBER; CURT MASSEY, AUTHOR MEMBER; ARBIE GIBSON, AUTHOR MEMBER; APPELLEES.

PETITION TO THE SUPREME COURT OF THE UNITED STATES OF AMERICA FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI, WESTERN DIVISION.

Filed November ....., 1946.

To the Honorable Hugo L. Black, Associate Justice, of the Supreme Court of the United States of America, and the Honorable Fred M. Vinson, Chief Justice, and the Honorable Robert H. Jackson, Associate Justice, of the Supreme Court of the United States of America.

The plaintiff-appellant, acting in accordance with public policy, prays that a writ of certiorari issue, to review

the Judgment of the District Court of the United States, in the above case.

OPINIONS OF THE DISTRICT COURT.

The Court orders of the court below containing the court's opinions in denying jurisdiction, under authority of Rule 8, of Federal Procedure are attached hereto as exhibits A, B, C, D, listed in Sections 6, 16, 18 and 19 of record.

There has been no ruling by the Supreme Court, as to how far the discretionary power of the Federal District Courts can go, in applying Rule 8, of Federal Procedure, without due consideration of all other Rules of Federal Procedure.

JURISDICTION.

The final Judgment of the court below denying an appeal to the Supreme Court, was entered November 7, 1946, the jurisdiction of this Court is envoked, under Sections 3 (b) and 8 (d) of the Act, of February 13, 1925, your petitioner adopts by reference, all statements contained in his jurisdictional statement, assignment of errors, petition for appeal and entire record of pleadings, as his points to be relied on, as this is a case of original jurisdiction, so as to establish the fact of law, as to jurisdiction of the court below, omitting the five exhibits of evidential fact filed with the court below.

QUESTIONS PRESENTED.

To determine substantial rights in pleading under the Rules of Federal Procedure; question of jurisdiction is at issue, in which the validity of a statute of the United

States is drawn in question, and the jurisdiction of the District Courts of the United States under a statute regulating federal procedure are drawn in question.

STATUTES INVOLVED.

The statutes involved are set forth in the Jurisdictional Statement, Paragraphs 1 and 2, Section 1 (d), of record.

STATEMENT.

The finding of fact of the District Court below, abuses the rules of federal procedure. The plaintiff-appellant constructed his complaint and amended pleadings to meet the requirements of the Anti-Trust Statutes, Title 15, Sec. 1, U. S. C. A. and Judicial Code 24, Amended, Title 28, Sec. 41, U. S. C. A. All allegations set forth in the complaint and two amended pleadings are alleged to be done by all defendants for one single purpose, to promote, maintain and utilize an illegal combination and conspiracy in restraint of interstate trade and commerce, as summarized in complaint, Chapter 8, Paragraphs 11, 12, 13, and first and second amended pleadings which shows the jurisdiction of the court below.

SPECIFIED ERRORS URGED.

The District Court erred:

1. In holding that Rule 8, of Federal Procedure requires all essential allegations to be incorporated into a statement of a cause of action.

2. In holding that the defendants were not charged with anything that comes under the Anti-Trust Laws.

3. In holding that the two amended pleadings did not show Jurisdiction of the District Court, and the plaintiff's claim for relief.

4. In holding that such a case is not appealable by law to the Supreme Court of the United States, from a District Court of the United States, when jurisdiction, only, is the question at issue.

REASONS FOR WHICH THE WRIT SHOULD BE GRANTED.

It is of vital interest to the public at large to know if the federal district courts in their discretionary power, granted the federal district courts, under the Rules of Federal Procedure, are going to liberalize pleading under such rules, to meet the requirements of justice, or confine pleading to a narrow, dogmatic technical form, to be taken advantage of as a means to an end defeating justice, by abridging, modifying and enlarging the substantive rights of litigants, in a manner regretfully put to practice in the past under common law and federal code pleading.

In behalf of public interest your petitioner demands an opinion of the Supreme Court of the United States as to the limitations of Rule 8, of Federal Procedure.

Wherefore, it is respectfully submitted that this petition should be granted.

Edward Vance,
Plaintiff-Appellant,
R. 1, Box 191-C,
Independence, Missouri,
Attorney for self.

LIST OF CITATIONS.

Memorandum (this Brief pages 92-95), Section 14, of record. 20 citations with each court's opinion.

Memorandum (this Brief pages 102-104), Section 17, of record. 6 citations with each court's opinion.

Constitution of the United States, Article I, Section 8, Clause 3, 21. Commercial Intercourse; Interstate communication of a business nature whatever the means of such communication is interstate "interstate commerce" subject to regulation by congress under this clause. *North Am. Co.* v. *Securities and Exchange Commission,* 1946, 66 S. Ct. 785, 9 L. Ed. ——.

Constitution of the United States, Article I, Section 9, Clause 3, 2. What constitutes *ex post facto* law generally. Enactment limiting the time for prosecution of offenses may be changed or repealed altogether in any case where original period of limitation has not yet completely run. *U. S.* v. *Fraidin,* (D. C. Md.) 1945, 63 F. Supp. 271.

Every negotiation and dealing between citizens of different states which contemplates and causes an importation into one state from another, whether it be goods or information, is a transaction of "interstate commerce." *Progress Tailoring Co.* v. *Federal Trade Commission,* (C. C. A. 7) 1946, 153 F. 2d 103.

U. S. v. *One Ford Coupe, Motor No. 182585824,* (D. C. Pa., 1939) 26 F. Supp. 598; *Walsh* v. *Connecticut Mut. Life Ins. Co. of Hartford, Conn.,* (D. C. N. Y., 1939) 26 F. Supp. 566.

Moore v. *Illinois Cent. R. Co.,* (D. C. Miss., 1938) 24 F. Supp. 731.

Laverett v. *Continental Briar Pipe Co.,* (D. C. N. Y., 1939) 25 F. Supp. 80.

Van Dyke v. *Broadhurst*, (D. C. Pa., 1939) 28 F. Supp. 737.

Kraus v. *General Motors Corporation*, (D. C. N. Y., 1939) 27 F. Supp. 537.

SEC. 1 (b).

In the District Court of the United States for the Western District of Missouri, Western Division. Edward Vance, Plaintiff, vs. American Society of Composers, Authors and Publishers et al., Defendants. Civil Action No. 4139.

Petition for Direct Appeal to the Supreme Court of the United States.

The petition of Edward Vance, the plaintiff herein, respectfully shows that on the 19th day of June, 1946, an order sustaining the defendant's motion to dismiss was entered, granting the plaintiff the right to amend for the purpose of showing jurisdiction of the Court and plaintiff's claim for relief, and on the 9th day of October, 1946, the plaintiff's complaint was dismissed, and a final order entered overruling the plaintiff's motion to vacate the two above said orders, on the 29th day of October, 1946, in which judgment and the proceedings had prior thereto in this action certain errors were committed to the prejudice of the plaintiff, all of which more fully appear from the assignment of errors which is filed herewith.

Wherefore, plaintiff prays that his appeal be allowed to the Supreme Court of the United States, and that citation be issued as provided by law, and that a transcript of all the record, proceedings, and documents upon which said orders were based, duly authenticated, be sent to the Supreme Court of the United States, under the rules of such court in such cases made and provided.

And your petitioner further prays that the proper order relating to the required security to be required of him be made.

Edward Vance,
Plaintiff,
R. 1, Box 191-C,
Independence, Missouri,
Attorney for self.

True copies of plaintiff's petition for appeal and assignment of errors and jurisdictional statement has been mailed to attorneys of record this day, November 6th, 1946.

Edward Vance,
Plaintiff,
R. 1, Box 191-C,
Independence, Missouri,
Attorney for self.

SEC. 1 (c).

In the District Court of the United States for the Western District of Missouri, Western Division. Edward Vance, Plaintiff, vs. American Society of Composers, Authors and Publishers et al., Defendants. Civil Action No. 4139.

Assignment of Errors.

Comes now Edward Vance, an individual plaintiff in the above entitled cause, and files the following assignment of errors upon which he shall rely in the prosecution of the appeal to the Supreme Court of the United States herewith petitioned for in said cause from the orders of the District Court of the United States for the Western District of Missouri, entered on the 19th day of June, 1946, October 9, 1946, and final order October 29, 1946.

1. The District Court erred in holding that the plaintiff should "Incorporate all his essential allegations to a statement of a cause of action." And that such technical construction of form is authorized by Rule 8 of Federal Procedure.

2. The Court erred in dismissing the plaintiff's complaint against the defendants which favored the defendants and prejudiced the plaintiff, enlarging the defendant's substantive rights and rendered an injustice to the plaintiff, as rule 8 was interpreted and applied so as to nullify all other Federal Rules.

3. The Court erred in refusing to construe the plaintiff's complaint and two amended pleadings on their merits in the light of Justice as authorized and warranted by the Act of Congress, June 19, 1934, Chapter 651 (48 Stat. 1064). U. S. C., Title 28, Sec. 723 b, 723 c.

Wherefore, plaintiff prays that the said order may be reversed, and for such other and further relief as to the Court may seem just and proper.

Edward Vance,
Plaintiff,
R. 1, Box 191-C,
Independence, Missouri,
Attorney for self.

SEC. 1 (d).

Supreme Court of the United States of America. ——— Term, 1946. Edward Vance, Appellant, vs. American Society of Composers, Authors and Publishers; Deems Taylor, President; George W. Meyer, Secretary; Max Dreyfus, Treasurer; Shapiro, Bernstein and Company, Incorporated, Music Publisher Member; Edwin H. Morris and Company, Incorporated, Music Publisher Member; Jenkins Music Company, Incorporated, Music Publisher Member; Music Publishers Protective Association, of Music Publisher Members; Martin Meltzer, District Manager; Maurice J. O'Sullivan, Business and Legal, District Representative; Hudson R. Morton, District Representative; Dick Howard, Author Member; Bob Ellsworth, Author Member; Russ Morgan, Author Member; Curt Massey, Author Member; Arbie Gibson, Author Member; Appellees. No.——————.

Appeal from the District Court of the United States for the Western District of Missouri, Western Division.

Jurisdictional Statement.

Filed November 6, 1946.

Comes now Edward Vance, appellant herein, and concurrently with the presentation of his petition for the allowance of an appeal from the District Court of the United States for the Western District of Missouri, under Title 28, Section 380 a, of the United States Code, to the Supreme Court of the United States, herewith and hereby presents this statement disclosing the basis upon which the Supreme Court of the United States has jurisdiction upon such appeal to review the order from which said appeal is taken.

The appellant in support of the jurisdiction of the Supreme Court of the United States to review on appeal the above entitled cause and the order of the District Court denying the plaintiff's prayer for a permanent injunction and final order dismissing the plaintiff's complaint denying jurisdiction in said cause, respectfully represents:

1. The statutory provisions believed to sustain jurisdiction are Title 28, Section 380 a, of the United States Code, and particularly the following provisions thereof:

> "An appeal may be taken directly to the Supreme Court of the United States upon application therefor or notice thereof within thirty days after the entry of the order, decree, or judgment granting or denying, after notice and hearing an interlocutory or permanent injunction in such case.
>
> "Appeals under this section shall be heard by the Supreme Court of the United States at the earliest possible time and shall take precedence over all other matters not of a like character."

8 F. C. A., Title 28, Sections 345, 349 a, and particularly the provisions in Judicial Code, Section 238 amended, granting direct review by the Supreme Court of the United States;

> "in any case in which the jurisdiction of the Court is in issue."

2. United States Statute, enforcement, operation and execution of which is sought to be enjoined is the act of June 19, 1934, Chapter 651, Sections 1, 2 (48 Stat. 1064), U. S. C., Title 28, Sections 723 b, 723 c, known as the rules of Federal Procedure Act, and particularly certain provisions of Section 1, thereof which reads as follows:

> "Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant."

3. The order of the aforesaid District Court denying the plaintiff's prayer for a permanent injunction and the final order of said court dismissing plaintiff's complaint denying jurisdiction entered June 19, 1946, October 9, 1946, October 29, 1946, respectively, and the application for appeal herein is presented November 6, 1946.

4. The nature of this case is to define and regulate the jurisdiction of the courts of the United States in an action to enjoin and restrain an illegal combination and conspiracy in restraint of interstate trade and commerce under the federal rules of procedure and establish a uniform system in pleading. The burden of proof has been held by the Supreme Court of the United States in an equity case as being a matter of substantive law.

> *Cities Service* v. *Dunlap*, 1939, 60 S. Ct. 201, 84 L. Ed. ——, reversing, 1938, 100 F. 2d 294, rehearing denied, 1939, 101 F. 2d 314, certiorari granted, 59 S. Ct. 828, 307 U. S. 617, 83 L. Ed. 1498.

In consideration of the above decision and the provisions in the statute sought to be enjoined herein the District Courts of the United States, in their discretionary power granted the district courts under the rules of federal procedure; can not make a final judgment as to jurisdiction, on the face of the complaint before trial, as the rules of federal procedure, are limited to matters of procedure only. As in:

> Title 28, Section 41, Subd. (1) "Determination of question of Jurisdiction." "Whether the complaint states a cause of action on which relief can be granted is a question of law and, just as issues of fact, it must be decided after and not before the court has assumed jurisdiction over the controversy. *Bell* v. *Hood*, Cal., 1946) 66 S. Ct. 773, 90 L. Ed."

5. The rulings of the District Court are inconsistent with substantial justice, on the following legal grounds: Under the federal rules there is but one form of action that is "Civil Action" and the rules have liberalized pleading so as not to be limited by any form or cause of action. The District Court's opinion attached hereto as contained in the Court Order, which reads as follows, "The plaintiff should incorporate all essential allegations into a cause of action" was salvaged from common law and code pleading which the federal rules abolished as in:

> Title 28, Section 41, Subd. (1) "Necessity of Showing Jurisdiction." "Jurisdiction of federal court is determined by allegations of the bill. *Hillsborough Tp., Somerset County, N. J.*, v. *Cromwell*, (N. J., 1946) 66 S. Ct. 445, 90 L. Ed. ....."

The character of proof shown is the essential elements of a complaint. A complaint can consist of more than one claim and claims can be inconsistent with each other. Some of the claims can be subordinate to others. The allegations can be conclusions as well as facts; they can be stated hypothetically, and it makes no difference whether the allegations are conclusions of law or facts. The District Court interpreted and applied federal rule 8 in a manner which nullified all other rules which provides ample provisions of discovery and correction of any insufficiency in pleadings. It would be an injustice to the appellant to be pressed to start all over again by rewriting his complaint to conform with the technical form outlined by the District Court.

6. The substantial questions involved in this case are:

> (a) Do the district courts of the United States possess discretionary power to the extent that the district courts of the United States can render final

judgment on the face of the complaint as to jurisdiction where the complaint does not conform to a certain technical form in construction, disregarding the merits of the complaint?

(b) That the word "claim" in the federal rules is not synonymous with the phrase "cause of action" under common law pleading.

7. The basic grounds of substantive questions involved are, that the plaintiff's substantive rights have been abridged and the defendant's substantive rights have been enlarged defeating the purpose of the above said statute sought to be enjoined in this case, as rule 8 of federal procedure was used as a means to an end, with prejudice to plaintiff.

8. The plaintiff's complaint filed May 15, 1946, and the two amended pleadings filed June 25, 1946, and July 9, 1946, respectively are constructed in form identically as in:

> "*Louisiana Farmers' Protective Union, Inc.*, v. *Great Atlantic & Pacific Tea Co.*, (C. C. A. 8) 131 F. 2d 419."

Which was an Anti-Trust Suit, and as in:

> "*United States of America* v. *American Society of Composers, Authors and Publishers et al.*, in the District Court of United States for the Southern District of New York, Civil Action No. 13-95, publication No. 76068."

Which was an Anti-Trust Suit which ended in a consent decree.

The appellant appends hereto copies of the three court orders together with the court's findings of fact and conclusions of law.

Respectfully submitted,

Edward Vance,
Plaintiff,
R. 1, Box 191-C,
Independence, Missouri,
Attorney for self.

SEC. 2.

In the District Court of the United States for the Western District of Missouri, Western Division. Edward Vance, Plaintiff, vs. American Society of Composers, Authors and Publishers; Deems Taylor, President; George W. Meyer, Secretary; Max Dreyfus, Treasurer; Shapiro, Bernstein and Company Incorporated, Music Publisher Member; Edwin H. Morris and Company Incorporated, Music Publisher Member; Jenkins Music Company, Incorporated, Music Publisher Member; Music Publishers Protective Association, of Music Publisher Members; Martin Meltzer, District Manager; Maurice J. O'Sullivan, Business and Legal, District Representative; Hudson R. Morton, District Representative; Dick Howard, Author Member; Bob Ellsworth, Author Member; Russ Morgan, Author Member; Curt Massey, Author Member; Arbie Gibson, Author Member; Defendants, Civil Action No.....

Complaint.

This action arises by virtue of and under authority of Section 1, and Section 7, of the Act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Com-

merce Against Unlawful Restraints and Monopolies," and the Acts amendatory thereof and supplemental thereto; Edward Vance, Plaintiff, Route Number 1, Box Number 191-C, Independence, Missouri, being engaged in his regular business of writing songs and sending them to publishers, to be published and to be used by the public in interstate trade and commerce, comes crying and praying for relief from injury of a combination and conspiracy, and acting in accordance with public policy, files this his petition in equity against the following named and described defendants and for cause of action alleges:

1.

1. That American Society of Composers, Authors and Publishers, hereinafter referred to as "Society," main office, 30 Rockefeller Plaza, New York, New York, branch office, 3615 Olive Street, St. Louis, Missouri, district office, 700 Columbia Bank Building, 921 Walnut Street, Kansas City, Missouri, is made a defendant herein.

2. That Deems Taylor, president, George W. Meyers, secretary, Max Dreyfus, treasurer, of the American Society of Composers, Authors and Publishers, during the times hereinafter mentioned, who have been or are now active in the management of the Society, or in the direction of the activities hereinafter described, are made defendants herein.

3. That Shapiro, Bernstein and Company Incorporated, music publisher member, 1270 Sixth Avenue, New York, 20, New York, Edwin H. Morris and Company Incorporated, music publisher member, 1619 Broadway, New York 19, N. Y. Jenkins Music Company Incorporated, music publisher member, 1217-23 Walnut Street, Kansas City, 6, Missouri, Music Publishers Protective Association,

music publisher members, 45 Rockefeller Plaza, New York, New York, Martin Meltzer, district manager of the Western District of Missouri, 3615 Olive Street, St. Louis, Missouri, Branch Office, Maurice J. O'Sullivan, business and legal district representative, 700 Columbia National Bank Building, 921 Walnut Street, Kansas City, Missouri, District office, Hudson R. Morton, district representative, 4540 Olive Street, Kansas City, Missouri, Dick Howard, author member, care of ASCAP 30 Rockefeller Plaza, New York, New York, Bob Ellsworth, author member, care of ASCAP 30 Rockefeller Plaza, New York, New York, Russ Morgan, author member, care of ASCAP 30 Rockefeller Plaza, New York, New York, Curt Massey, author member, care of ASCAP 30 Rockefeller Plaza, New York, New York, and Arbie Gibson, author member, care of ASCAP 30 Rockefeller Plaza, New York, New York, of the American Society of Composers, Authors and Publishers, during the times hereinafter mentioned, who have been or are now active in carrying out the rules adopted by the Society, or in the enforcement of policies laid down by the management hereinafter described are made defendants herein.

4. That the members of the Society other than those members thereof specifically named herein constitute a group so numerous that it would be impractical to bring all of them on before the Court by name; therefore, the aforesaid defendants named and described herein are sued as representing all members of the Society.

2.

5. That defendant Society, an unincorporated association, has been in business thirty years; that the purpose for which it was organized were, among other things, to

grant licenses and collect royalties for the public performance of the works of its members, to allot and distribute the royalties collected, and to accumulate and maintain a reserve fund to be used in carrying out any of the policies of the Society; that its membership list at the time of the filing of this complaint consist of approximately 1,600 composer and author members, and 200 publisher members; that it is affiliated with 21 national foreign societies representing approximately 50,000 foreign composers and authors; that it owns and controls 300,000 musical compositions; that the board of directors consist of 24 persons who are elected by the Society's members voting by mail; that some members have more electoral power than others by reason that they have more seniority in the Society and a larger number of musical compositions registered in the Society's catalog listing; that 12 members of the board of directors represent the composer and author members and that 12 members of the board of directors represent the publisher members; that each member upon admission must execute an agreement in the form required by the board of directors, assigning to the Society the exclusive nondramatic public performance for profit rights of all of the member's works for the period of any then existing agreement between the Society and its members; that the board of directors carries on all the affairs of the Society appointing the officers and lays down the policy for the employees of the Society who serve under a general manager and his staff, which consist of the general counsel and music police; that the board of directors appoints a classification committee who rates each member; that the rating is determined by the classification committee, and is based upon the length of membership of the individual, his general prestige and reputa-

tion, and the popularity and vogue of his works; that the royalties collected by the Society are divided after 21 per cent is taken out for overhead, collections, distributions, investigations and legal fees, 10 per cent goes to foreign affiliated societies, 4 per cent goes to standard writers and publishers, then the balance is divided equally 50 per cent to composer and author members and 50 per cent to publisher members.

3.

6. That defendant Society is a price fixing trade organization dominating over and is concerned with every act of the music business; that all other organizations in the music business are dependent upon defendant Society; that defendant Society in order to appear as being strictly a "Performing Right" Society to the general public, it has two affiliated subordinate organizations, which, it claims are trade organizations namely, "Music Publishers Protective Association," and "Songwriters Protective Association," addresses same as the Society's Address, and the officials that govern and determine rules and policies of these two subordinate organizations are practically the same officials that govern defendant Society; that the purpose for which the aforesaid two subordinate organizations exist is to force the members of defendant Society to live up to the rules and policies of defendant Society which are a combination and conspiracy in restraint of interstate trade and commerce.

7. That defendant Society does not give equal service to all citizens of the United States, and that it discriminates between each member of defendant Society; that defendant Society's 200 publisher members are corporations incorporated under state laws of each corporation's state respectively, and that

each state within which, these music publishing corporations have been incorporated provides ample laws with provisions enabling each corporation to transact all their business including interstate trade and commerce; that the principles which these music publisher members bring or add to the Society are commercial and mercenary only; that manufacturing of musical records and the publishing of musical compositions, and to be transported from state to state by defendant Society members to be sold over a counter as a commodity, is an act of interstate business of trade and commerce, and should be subject to state laws the same as any other business; that a published copy of a musical composition and a recorded record of a musical composition are material things and held to be distinct from copyright rights, by the copyright law of the United States; that it is unlawful for composers, authors and publishers to organize and collect licenses jointly under the pretense that they enforce that particular right inherent in musical copyright, or that they secure to the copyright owner exclusive control of public performance for profit; that there is a distinct difference between collective genius and individual genius; that when defendant Society's composers, authors, publishers pool their creative works to collect license fees jointly under a blanket system basing such collections on such unreasonable and variable things as seating capacity, and then divide the royalties collected on the basis of composers', authors' and publishers' seniority in defendant Society and the number of votes they have in defendant Society, that no exclusive right is being represented; that under this combination and conspiracy no author, composer or copyright owner is paid for the actual current use of his musical composition, but is paid just because he is a member of defendant Society to a certain degree

and has his musical compositions listed in defendant Society's catalog for defendant Society's exclusive use; that the author, composer and copyright owner sign their individual exclusive right away to defendant Society and restrict and limit the public use to their creative works; that defendant Society represents a small circle of writers and it defeats the purpose of the copyright law of the United States; that an exclusive right to collect license fees for public performance for profit, should be collected on per-use basis only; that per-use basis is the only right authorized and warranted by the copyright law of the United States; that the public who is the chief beneficiary of music should be the only one to classify an author and his creative works; that the one who performs in public should be free to choose from all copyrighted musical compositions; that all songs can not be published and that there are 20,000 to 30,000 musical compositions copyrighted each year; that defendant Society has only 300,000 songs in its control after being in business 30 years and 50 per cent of the Society's 300,000 songs have been rearranged and recopyrighted over and over for the purpose of giving a self selected privileged few a higher rating within defendant Society perpetuating a monopoly; that the public makes use of approximately 2,000 songs daily; that the monopolistic power of defendant Society hampers thousands of authors who are genuises buried beneath conditions that afford no chance for their development; that the publisher members of defendant Society plug certain songs to pile up a performance record because a publisher's rating in defendant Society depends 50 per cent upon the number of performances credited to his list of musical compositions; that the concerted actions of defendant Society's members puts a restraint on interstate trade and commerce affecting, published music, motion

pictures, recordings, electrical transcriptions, radio broadcasting, and television, through unlawful licensing of grand rights of licensing for public performance, unlawful merchandising, unlawful business and legal representation, unlawful use of mail, unlawful claims of copyright, and unlawful claims of authorship, in violation of Sherman Anti-Trust Law.

4.

8. That licenses to perform publicly for profit the musical compositions copyrighted by its members are issued by defendant Society upon application therefor; that representatives of defendant Society solicit applications for such licenses by threat of prosecution for infringement of the copyright law of the United States, from all unlicensed persons, firms or corporations in the United States who use music in connection with their business; that defendant Society boasts to the music users that it transacts its business in accord with a rate scale adopted by the federal government of the United States; that the representatives of defendant Society point out to the music users the inconvenience of a per-program and per-piece license, and then points out a blanket license as being more practical and convenient, and that the blanket license gives the music user unlimited use of defendant Society's entire catalog listing based on seating capacity; that such a blanket license destroys the economic incentive on the part of all music users, to perform the musical compositions of composers, authors and publishers not members of defendant Society, thereby depriving those owners of copyrighted musical compositions who are not members of defendant Society of the opportunity of having their musical compositions performed publicly for profit; that the music user has no incentive to use de-

fendant Society's entire catalog listing and uses the most current musical compositions demanded by the public; that more than 80 per cent of all licenses issued by defendant Society are blanket licenses, based on seating capacity and the music user has no alternative, but must accept licenses from defendant Society upon any terms and conditions imposed by defendant Society, or subject themselves to numerous infringement suits in which they would be compelled to pay not less than $250 for each copyright infringement, as provided in the copyright law of the United States; that defendant Society maintains agents and representatives throughout the United States and particularly in the western district of Missouri, whose duty it is to enforce the demands of defendant Society in the sale of licenses and in collecting royalties therefor, and prosecuting any infringements thereof; that all prices are arbitrarily fixed by defendant Society concentrating on blanket licenses under all circumstances, consequently discrimination ensues in violation of Section 2, Paragraph 2, of Consent Decree, between the United States and the American Society of Composers, Authors and Publishers, as judgment rendered March 4, 1941; that the laws of various states forbid collections of license fees by joint action as aforesaid described; that defendant Society operates in the state of Missouri, in violation of the Missouri Statute, Section Number 13313, entitled "Practice of Law," as revised 1939.

5.

9. That the "Consent Decree" of which the defendant Society boasts of operating in accord with, between the United States and the American Society of Composers, Authors and Publishers, as judgment rendered March 4, 1941, is ineffective and incompetent in reason that the

facts pro or con have never been considered and also, in reason that the wrongful and unlawful methods in which the members of defendant Society use to acquire the musical compositions of the Society's repertoire of music has never been considered by any court; that defendant Society exploits the United States Mail Department, through the use of form letter number 2948, to promote and maintain the aforesaid combination and conspiracy hereinafter described more in detail; that defendant Society does influence federal employees in their administrative duties, in the United States Library of Congress Copyright Office, to make false statements with reference to copyright records, and that such illegal performance of public duty lends support to the aforesaid combination and conspiracy in restraint of interstate trade and commerce.

6.

10. That for many years preceding as well as during the period of five years next preceding the filing of this complaint, and continuing to the date of the filing thereof, defendants, and others to the United States Attorney unknown, well knowing the foregoing facts, have been engaged in the United States, and particularly in the Western District of Missouri, in a wrongful and unlawful combination and conspiracy in restraint of the aforesaid interstate and foreign trade and commerce, affecting published music, motion pictures, recordings, electrical transcriptions, radio broadcasting, and television, through unlawful licensing of grand rights of licensing for public performance for profit, unlawful merchandising, unlawful business and legal representation, unlawful use of mail, unlawful claims of copyright, and unlawful claims of authorship creating and maintaining a monopoly in viola-

tion of Section 1, and Section 7, of the Act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies" (U. S. C. A., Title 15, Section 1), commonly known as the Sherman Act, and have conspired to do all acts and things and to use all means necessary and appropriate to make said restraints effective, including the means, acts and things which at the time of filing this complaint are unknown to the United States Attorney; that as a part of said conspiracy the defendants have arranged and agreed among themselves to do the following things:

7.

A. To create, maintain and utilize defendant Society as an instrumentality for promoting and maintaining the illegal combination and conspiracy herein described; to vest in defendant Society a complete monopoly of the right to license for public performance for profit all the musical compositions of all its members; to eliminate competition among members of defendant Society in the sale of rights to perform publicly their respective musical compositions, which, if it were not for the illegal combination and conspiracy herein described, would have existed; to refuse any one desiring the right to perform publicly the copyrighted musical compositions of members of defendant Society, the right to acquire from the individual members of the Society the public performance rights for profit of their respective copyrighted musical compositions.

B. To agree to maintain the illegal combination and conspiracy by unlawful pooling of their individual copyright monopolies by fixing non-competitive prices or royalties for licenses to perform publicly their individual copyrighted musical compositions, and to eliminate all rivalry as to the merits of their individual musical com-

positions contrary to the purpose of the Copyright Law of the United States; to agree not to have two or more members in defendant Society with musical compositions carrying titles similar or conflicting for the purpose of eliminating all competition within defendant Society, which, conspiracy mars, abates and hampers the progress of science and useful arts; to agree to enforce the following combination and conspiracy in restraint of interstate trade and commerce through barter, traffic and treachery, and to do in a concerted action the following things hereinafter described in detail; to have defendant Society's members through defendant Music Publishers Protective association, to establish and maintain a "Title Registration Bureau" and inasmuch as song titles can not be copyrighted or legally protected, the members of the Music Publishers Protective Association, have entered into a "Gentlemen's Agreement" whereby they register with the Music Publishers Protective Association, the titles of all songs that they are putting into publication or are planning to put into publication, if there exist in the files of the Bureau a title similar, or conflicting with one that a publisher wishes to register, the publisher then agrees not to use the title unless the original registrant shall voluntarily waive his rights, or shall have failed, one year from the date of his registration, to have published the composition bearing the registered title; to prepare in this manner all musical compositions, to be pooled with defendant Society eliminating all competition within defendant Society, and too, this secret agreement enables defendant Society members to lay claim to amateur's song material sent to defendant Society and affiliated organizations, for the purpose of adding prestige to defendant Society's repertoire of music, encouraging literary piracy, eliminating competition between defendant Society and nonmembers,

giving a self selected privileged few a larger share of all defendant Society's royalties collected on seating capacity basis under a blanket system, promoting and maintaining the illegal combination and conspiracy herein described.

C. To agree to maintain the illegal combination and conspiracy by exploiting the Post Office Department of the United States, through the use of form letter number 2948, for the purpose of promoting defendant Society by answering all inquiries of nonmembers, with reference to service defendant Society gives to the public at large, so as to never have to be responsible for any direct statement made by any member of defendant Society, or any business contact made by defendant Society, should the nonmember making the inquiry lose his song material by any combine of members of defendant Society stealing it in order to add prestige to defendant Society's repertoire of music by faking rearrangements and recopyright registrations by signing two or more older members' names to the nonmember's song material, thereby making matters more complicated for the nonmembers of defendant Society to prosecute the aforesaid combination and conspiracy, and should the nonmembers be awarded by a court in a private law suit all royalties due the nonmember, why then the combine of members of defendant Society became unjustly enriched by sharing a larger amount of all defendant Society's royalties collected under a blanket system and divided on the basis of voting capacity and seniority defendant Society's members have, promoting and maintaining the illegal combination and conspiracy forever notwithstanding the fact that defendant Society's members were convicted in a private law suit for literary piracy; to use the aforesaid form letter for the purpose of deceiving the public and to have the public believe that defendant Society represents only the intangible and incorporeal

right of composers and authors, and to enclose with the aforesaid form letter literature pertaining to so-called song sharks, branding all publishers who have not subscribed to the aforesaid combination and conspiracy, as being illegitimate and not worthy of amateur aspirant songwriter's trust; to beg to be excused for using the aforesaid form letter, stating that the Society receives so many such letters of inquiry that it is impractical to answer otherwise with a limited staff, when defendant Society's clerical staff consists of approximately 250 persons; to enclose with aforesaid form letter a complete list and addresses, of all defendant Society's publisher members who are held out in the so-called song shark literature enclosed as being legitimate and worthy of trust, to make other and further statements in other literature issued by defendant Society's members that defendant Society and its two affiliated subordinate organizations hereinbefore described, throws all songs or song material into the waste basket received from amateurs or nonmembers of defendant Society; to issue this propaganda literature for the purpose of creating a frenzy of mind in the amateur songwriters so as to induce the amateur aspirant songwriters to readily submit their musical compositions to some publisher member of defendant Society, when only two music publisher members of defendant Society publish songs for amateurs, and then defendant Society members present the amateur's song or song material to defendant Society's Music Publishers Protective Association, "Registration Bureau" to be used through barter, traffic and treachery, wherever the amateur's song material will add the most prestige to defendant Society's repertoire of music through faking rearrangements and recopyrights blending the material submitted by the amateur to some old song owned and controlled by defendant Society, assigning two or more

Society members having the highest rating and voting capacity, keeping the largest share of the Society's royalties within a small circle within defendant Society, thereby, keeping the same officers in charge of defendant Society throughout the Society's history; to copyright any short jingle or melody and hold in reserve for the purpose of doing the things and acts hereinabove described, so as to control the music business throughout the world.

D. To keep a record of all musical compositions used by broadcasting stations for the purpose of knowing how to conduct their operations through defendant Society so as to prevent the development of competition between members of defendant Society and owners of copyrighted musical compositions who are not members of defendant Society; to concentrate on licensing all music users under a blanket license, and merely comply to other provisions contained in the aforesaid consent decree, "just to the letter only."

E. To maintain and promote the illegal combination and conspiracy by establishing and maintaining the "Song Hit Guild," Incorporated, 1619 Broadway, New York, New York, same address of 43 music publishing corporations, who are music publisher members of defendant Society; to endorse, encourage and sponsor wholesale literary piracy through the acts things and means of the Song Hit Guild, Incorporated, by advertising in current magazines soliciting amateur aspirant songwriters participation in the Song Hit Guild, Incorporated, project, waged twice a year for the purpose of enticing amateur aspirant songwriters, to submit their song material through aforesaid project by paying $2 for a folio, which instructs the amateur how to submit his song material so as to obtain so-called professional service and collaboration with defendant Society's

composer and author members, and to pay $1 for each lyric, melody or musical composition submitted, and no material or rejection slips are sent back to the amateur; to instruct the amateur aspirant songwriter not to send a verse with his song material, stating the reason for such instruction or advice, is that he the amateur can write the verse after he obtains collaboration with defendant Society's composer or author member, just send along the "Chorus" explaining that the idea is all that is needed for the amateur to obtain professional service of defendant Society's members, the chorus is the nucleus of any song, and the verse is written from the meaning of the chorus; to have the Song Hit Guild, Incorporated, to act as intermediary between the Society's composer and author members and amateur so that defendant Society's members can avoid ever having to acknowledge direct contact with the amateur; and the Song Hit Guild, Incorporated, not only gets the amateur's money but all of his new creations, for the members of defendant Society to make use of through barter, traffic and treachery; to choose five or six musical compositions possessing the lowest merits to be published in folios to be used in future projects and from the mass of material received from amateur defendant Society members adds prestige to defendant Society's repertoire of music in the manner hereinbefore described; to put the amateur's name on the Song Hit Guild's mailing list to be solicited from time to time when projects are waged for the purpose of bleeding the amateur while trying to make the amateur believe that all avenues to the song business are closed except by the way of the Song Hit Guild, Incorporated, and such racketeering has free access to the United States Mail Service; to use a numbered coupon with each lyric, melody or musical composition submitted so as to not have to refer to any song material by name, and be held responsible for same should the amateur become

wise to the racket, and very few amateurs get to collaborate with defendant Society's members as promised by the Song Hit Guild, Incorporated, for there is a greater inducement for the defendant Society's composer and author members to write a verse from the meaning of the original song material sent to the Song Hit Guild, Incorporated, and claim it as his own to be added to defendant Society's repertoire of music placing defendant Society's writer member in a higher bracket rating so as to draw a larger share of all defendant Society's royalties collected by collective bargaining under a blanket system in restraint of interstate trade and commerce.

F. To agree to maintain and promote the illegal combination and conspiracy by doing all acts and things and to use all means necessary and appropriate to make said restraint effective, the defendants have agreed among themselves to do the following things; to not acknowledge receipt of the lyric "Some Body Else Is Taking My Place" sent to the general manager of defendant Society, through special delivery mail, by Edward Vance, plaintiff September 2, 1940, until the plaintiff sent to the general manager of defendant Society a second letter through registered mail, demanding to know why defendant Society did not return the abovesaid lyric, as the plaintiff had sent to defendant Society return postage, if defendant Society were not going to make use of the abovesaid lyric; to answer the plaintiff's second letter and acknowledge receipt of abovesaid lyric, October 9, 1940, by saying as follows, "Your lyric has been turned over to Shapiro, Bernstein and Company, Inc., for examination and approval. Facilities available for publication do not exist at present, however, favorable conditions for future publication may arise," and enclose hereinbefore said described form letter number 2948, a membership list of composers and authors

of defendant Society in the year of 1940, together with defendant Society's propaganda literature with reference to so-called song sharks. entitled "Racket and Roses" and "Genius and Justice"; to not acknowledge receipt of the two lyrics sent by the plaintiff to the defendant Society's author member Russ Morgan, on or about November 12, 1940, entitled "Somebody Else Is Taking My Place" and "Honey I'm In Love With You"; to fake an assignment with Charles Friedman, Back Bay Music Company, in accord with hereinbefore described conspiracy agreements carried out by defendant Music Publishers Protective Association's Registration Bureau, for the purpose of preparing all songs to be pooled in defendant Society's repertoire of music, eliminating competition between defendant Society and the plaintiff who is not a member of the Society promoting and maintaining the illegal combination and conspiracy, by faking the following registrations, "The following documents referring to 'Somebody Else Is Taking My Place' from Back Bay Music Company, to Shapiro, Bernstein Company, Inc., the document bearing the date of execution November 4, 1941, received in Copyright Office of United States, October 14, 1941, and recorded in Volume 471, page 193," and to fake the following registration of the old song controlled by defendant Society for the purpose of laying claim to the plaintiff's song which, possessed merits and required no revisions and was received more than 14 months before by the general manager of defendant Society and more than 12 months before by Russ Morgan, an author member of defendant Society and receipt acknowledged by the vice president of defendant Society, by changing the old song from a waltz which it was to a fox trot, which, the plaintiff's song is; "Somebody Else Is Taking My Place" (Fox Trot) arranged by Paul Weirick, words and music by Dick

Howard and Bob Ellsworth, and Russ Morgan, was registered in the name of Shapiro, Bernstein and Company, Inc., under No. E pub. 100648 following publication December 13, 1941, copyright claimed on new matter: arrangement for orchestra," and then to fake the following registration 16 days later finishing up with a song the same as sent to defendant Society by plaintiff September 2, 1940, "Somebody Else Is Taking My Place" words and music by Dick Howard, Bob Ellsworth, and Russ Morgan, new matter by Russ Morgan, was registered in the name of Shapiro, Bernstein & Co., Inc., No. E pub. 101174, following publication December 29, 1941, and the deposit of two copies December 30, 1941. Copyright claimed on new matter: Revision of words, additional words and changes in music," to do all the above said acts in true form of the tradition of defendant Society in order or for the purpose of acquiring ownership of all melodies and change lyrics at will and to gain control of all songs in existence; to have the United States Postal Inspector, to write the plaintiff after having conference with general manager of defendant Society, and tell the plaintiff that the plaintiff's lyric "Somebody Else Is Taking My Place" is word for word the same as the old original song published by defendant Society members in the year of 1937, carrying the same title; then to have a copyright attorney representing the Copyright Office of the United States, to tell the plaintiff that the above said lyric was word for word the same as the song published in the year of 1937 by defendant Society members ignoring the registration No. E pub. 101174, and the defendant Society's general manager and its publisher members wrote to the plaintiff telling the plaintiff they had not made use of his song as the same had been copyrighted in the year of 1937, ignoring copyright registration No. E pub. 101174, and when

the plaintiff called all the defendants' attention to registration No. E pub. 101174, then all defendants agreed to remain silent which action is another phase of the combination and conspiracy having some one who is not directly responsible for the wrongful and unlawful acts to answer as an avenue of escape from having to be held responsible for any definite statements: to hold in restraint the plaintiff's song "Somebody Else Is Taking My Place" for sixteen months for the purpose of having any defendant Society members to lay claim to it where it would add the greatest prestige to defendant Society's repertoire of music, and to do the aforesaid acts and things in violation of Section 17, and Section 36, of the Copyright Law of the United States, as amended March 4, 1909, in restraint of interstate trade and commerce so defendant Society could eliminate competition between defendant Society and Edward Vance the plaintiff.

G. To have and maintain a closed shop through defendant Society's monopolistic power so that when the two defendants who are supposed to be noted artists, Curt Massey and Arbie Gibson, decided to have the original lyric, which they acknowledged receipt of from the plaintiff published, entitled "Honey I'm In Love With You," the two above said defendants had to enter project Number 6, waged by the "Song Hit Guild Incorporated" in the first six months of the year of 1942; the "Okeh Recording Company" U. S. Post Office Box 2828, Hollywood, California, obtained the above said lyric by mail from the plaintiff in reply to an ad it carried in a current magazine, and on or about October 9, 1941, the defendant Arbie Gibson, supposed to be musical director of said company solicited the plaintiff, by mail for money to pay for making a recording of said lyric for the plaintiff, and on or about December 10, 1941, a member of Louise Massey's orchestra,

engaged the plaintiff in conversation, in Kansas City, Missouri, long enough to determine the plaintiff's financial ability, to see if the plaintiff would be able to bring suit against the Okeh Recording Company, for literary piracy, and then some time during the first six months of 1942, Curt Massey defendant, claimed Arbie Gibson defendant, as collaborator and entered project number 6 waged by Song Hit Guild, Incorporated, and Sponsored by Santly-Joy-Select, Incorporated, who turned same above said song over to Edwin H. Morris and Company, Incorporated, to be published, while the Columbia Recording Company, already had exclusive right of an "Okeh Recording," and put same on the market in August, 1942, under the title as sent in by plaintiff to Okeh Recording Company, October 5, 1941, and then the title was changed to "The Honey Song" in recognition of defendant Society's rules carried out by defendant Society's subordinate affiliated, Music Publishers Protective Association's "Registration Bureau" because defendant Society had control of a song entitled "Honey I'm In Love With You" published about the year of 1924, and then the plaintiff's song was published October 30, 1942, Copyright registration No. E pub. 108976, and then on about July 30, 1943, the plaintiff notified Edwin H. Morris and Company, Incorporated, that the plaintiff was the author of the song published under the title "The Honey Song"; the defendant Society's publisher member Edwin H. Morris and Company, Incorporated, denied the plaintiff's charge and threatened the plaintiff with explanatory assertions of the forcefulness of the Copyright Law of the United States, and also expounding the cost that the plaintiff would have to encounter; and then on or about November 22, 1943, the plaintiff made a reply to defendant Society's music publisher member Edwin H. Morris and Company, Incorporated, and

immediately this defendant Society's publisher member announced a new lyric to "The Honey Song" plugging the new lyric by having Dinah Shore, to sing this new lyric on the Fitch Band Wagon Parade program for two weeks and then two weeks following this new lyric was plugged and sung by Kate Smith on her program, and this new lyric was the same lyric sent to Russ Morgan, by plaintiff on or about November 12, 1940; to not apply for a new copyright on this new lyric but claimed copyright on both the new lyric and the old lyric of "The Honey Song" as being original in 1942 as recorded by Louise Massey, and the Westerners, and also claiming Curt Massey and Arbie Gibson defendants as authors of this new lyric when this new lyric had been held in restraint for more than three years to be used by any member or members of defendant Society where ever it would add the most to defendant Society's repertoire of music which is being used all over the United States in interstate trade and commerce, and then to refuse Columbia Recording Company exclusive recording rights any longer by having Decca Recording Company, to record for Denver Darling, the new lyric, freezing out Louise Massey, and the Westerners' recording of 1942; to withdraw from the market the plaintiff's three lyrics that defendant Society's members had made use of through barter, traffic and treachery for more than three years when the plaintiff filed in the United States District Court, a petition complaining of the aforesaid actions, so that the responsibility for the illegal combination and conspiracy could be shifted to the individuals directly concerned who likewise would hope for a settlement in litigation of a private law suit, so that the illegal combination and conspiracy can carry on fooling the public and the courts of the land by having the public and the courts to believe that defendant Society represent only

the intangible and incorporeal rights of Composers and authors.

H. To prevent the sale and transportation in interstate trade and commerce of musical compositions owned by composers, authors and publishers who are not members of defendant Society, by refusing to issue licenses for the public performance of musical compositions owned or controlled by them, except upon the terms and conditions hereinbefore described.

I. To enter into agreements with music users throughout the United States and particularly in the Western District of Missouri, which discriminates in price or terms between different music users similarly situated, for the purpose of maintaining defendant Society's blanket system arrangement which is instrumental in promoting and maintaining the illegal combination and conspiracy hereinbefore described.

8.

11. That the defendants have adopted the means and engaged in the activities hereinbefore described, with the intent, purpose, and effect of unreasonably and unlawfully maintaining a price fixing combination wielding the power of life and death over every business dependent upon copyrighted musical compositions for existence, in the interstate commerce in copyrighted musical compositions controlled by the Society, and have otherwise restrained unreasonably the interstate commerce of published music, motion pictures, recordings, electrical transcriptions, radio broadcasting, and television; that all members of defendant Society, through the mutual and identical agreements hereinbefore described, have actively and effectively restrained their own activities, have eliminated competition

among themselves, and have created, maintained and utilized defendant Society as an instrumentality unreasonable to restrain and restrict, directly and indirectly the interstate trade and commerce as hereinbefore described, injuring the plaintiff beyond any form of redress that would compensate for injuries sustained by the plaintiff in his regular business of writing songs, causing the plaintiff's ambition to be marred, his life to be impeded, his health and character to be impaired and costing the plaintiff time and money instituting an investigation of the illegal combination and conspiracy hereinbefore described.

9.

12. That the combination and conspiracy herein set forth has operated and has been carried out in part within the Western District of Missouri, and many of the unlawful acts pursuant thereto have been performed by defendants and their representatives in said District; that the interstate trade and commerce in published music, motion pictures, recordings, electrical transcriptions, radio broadcasting, and television as herein described, is carried on in part within said District; that said defendants have usual places of business in the said District and therein transact business and are within the jurisdiction of the Court.

13. That this Complaint is filed and the jurisdiction of this Court is invoked against defendants American Society of Composers, Authors and Publishers, its officers and directors, agents and representatives, and the members thereof, because of their violations, jointly and severally, as herein alleged, of Section 1, and Section 7, of the Sherman Anti-Trust Act, entitled "An Act to Protect Trade and Commerce Against unlawful Restraints and Monopolies."

14. Wherefore, the plaintiff prays: That a writ of subpoena issue, directed to defendants named herein, demanding said defendants to appear herein and answer the allegations contained in this Complaint; that the combinations, conspiracies, agreements, and activities of defendants described in this Complaint be declared to constitute a conspiracy in restraint of interstate and foreign trade and commerce, and to be illegal and in violation of Section 1, and Section 7, of the Act of Congress approved July 2, 1890, known as the Sherman Anti-Trust Act; that the defendant Society and each and all of its respective officers, managers, agents, employees, members, and all persons acting or claiming to act on behalf of defendants be enjoined and restrained from entering into any contract, agreement, conspiracy, or otherwise do the following acts and things:

(1) From entering into any licensing agreement with any user of music which discriminates in price or terms between different users similarly situated.

(2) From requiring the author, composer and copyright owner members to sign their individual copyright monopolies, away to defendant Society, restricting and restraining the public's use to their respective creative works.

(3) From electing the members of the Board of Directors of the Society other than by a membership vote in which all author, composer and publisher members have equal electoral power by casting one vote only for their respective representatives to serve on the Board of Directors.

(4) From distributing to its members the money received by granting the right to perform copyrighted

musical compositions publicly for profit on any basis other than, per use basis.

(5) From entering into any licensing agreement with any music user under any circumstances or conditions where such licenses to perform publicly copyrighted musical compositions for profit are issued on such unreasonable and variable basis as "Per Blanket License," or the basis of seating capacity.

(6) From issuing licenses to perform publicly musical compositions for profit on any basis whatsoever, other than "Per Use Basis" in compliance with the Copyright Law of the United States.

(7) From acquiring or asserting any exclusive performing right as agent trustee, and or, any collective bargaining right on behalf of any copyright owner or other owner of the performing right, with respect to any copyrighted musical composition not owned by the Society.

(8) From exercising any rights other than the rights of a royalties collecting agency.

(9) From operating in joint action as music police, law enforcement officers, maintaining a legal staff which represents authors and composers and publishers business and legal interest, who are individual members of defendant Society, in violation of the Missouri Statute, Section 13313, entitled "Practice Of Law" as revised 1939.

(10) From using form letter number 2948, having no date on it and no individual's name signed to it, enclosing defendant Society's propaganda literature, enticing amateur song writers to submit their creative song material, to defendant Society's publisher members when, only two publisher members publish songs for amateurs.

(11) From operating under a so-called "Consent Decree" entered into between the United States, and the American Society of Composers, Authors and Publishers, as judgment rendered March 4, 1941, in which Section (1), Paragraph 2, and Section (9) of Paragraph 2, are the very essence of monopoly, making the United States Department of Justice, fostering the aforesaid racket, which renders the Sherman Anti-Trust Law, a mere farce in so far as consent decrees are concerned.

(12) From copying, using, selling, publishing or licensing in any manner or form, or under any name whatsoever, the said literary property of the plaintiff, or any portion thereof, without the consent and permission of the plaintiff; a permanent injunction restraining such action, forfeiting copyright registration No. E pub. 101174, and No. E pub. 108976, obtained through defendant Society's illegal combination and conspiracy in restraint of interstate trade and commerce.

(13) From operating the Song Hit Guild, Incorporated, as an instrumentality maintaining the illegal combination and conspiracy herein described, deceiving the public by making promises through the mail which the Song Hit Guild, does not fulfill.

(14) From copying, using and assigning two or more names of defendant Society's members, to unpublished copyrighted musical compositions owned by authors who are not members of the Society, for the purpose of adding prestige to defendant Society's repertoire of music and keeping the largest share of all royalties collected by defendant Society within a small circle within the Society, eliminating competition between defendant Society and the author who owns the unpublished copyrighted musical composition.

15. That the plaintiff have the equivalent of all earnings derived from the two above said songs, three hundred thousand dollars ($300,000) as loss to the plaintiff, and the plaintiff demands judgment against the defendants for triple damages in the sum of nine hundred thousand dollars ($900,000) to be determined in the discretion of the Court, plus such other and further relief as may be fair and justly due the plaintiff in equity, and that the plaintiff recover his cost and disbursement of the action.

Edward Vance,
Plaintiff,
R. 1, Box 191-C,
Independence, Missouri,
Attorney for self.

In the District Court of the United States for the Western District of Missouri, Western Division. Edward Vance, Plaintiff, vs. American Society of Composers, Authors and Publishers, et al., Defendants. Civil Action No. 4139.

Affidavit.

State of Missouri, County of Jackson, ss:

Edward Vance, Plaintiff, being duly sworn states that he has attached to the original complaint filed with the Court, five exhibits, and has in his possession more than thirty more exhibits to be used as evidence, and has fifteen or more witnesses; and that he the plaintiff will furnish photostat copies of any exhibit desired by any defendant, when the defendants have made their reply to this complaint; and that he the plaintiff will furnish any defendant the names and addresses of all his witnesses to be interrogated when the defendants have made their

reply to this complaint. That the cause of actions alleged in the complaint are true to the best of his knowledge and are not made out of levity or by collusion, fear or restraint, and they are made for no reason other than to encourage and promote justice.

Subscribed and sworn to before me this 15th day of May, 1946. My commission expires November 25, 1946.

Edward Vance,
Plaintiff,
Attorney for self.

Setta H. Reed,
Notary Public.
(Seal)

SEC. 3.

In the District Court of the United States for the Western District of Missouri, Western Division. Edward Vance, Plaintiff, vs. American Society of Composers, Authors and Publishers et al., Defendants. No. 4139.

Motion of Defendant Jenkins Music Company to Dismiss.

Comes now Jenkins Music Company and moves the Court to dismiss the above cause as to this defendant for the following reasons, to wit:

(1) because the complaint fails to state a cause of action against this defendant;

(2) because of lack of jurisdiction of the subject matter or of this party defendant for the reason that the complaint recites that the plaintiff resides on Route No. 1, Independence, Missouri, and the fact is that defendant Jenkins Music Company is a Missouri corporation with

its principal place of business in Kansas City, Missouri; and

(3) because the complaint does not comply with the rules of civil procedure, and especially Rule 8.

Wherefore, this defendant prays an order of this Court dismissing said cause as to defendant Jenkins Music Company.

Homer H. Bergen,
1701 Bryant Building,
Kansas City, Missouri,
William H. Curtis,
1701 Bryant Building,
Kansas City, Missouri,
Attorneys for Defendant
Jenkins Music Company.

We have today mailed a copy of Motion and Suggestions to the Plaintiff at the address given at the bottom of his petition.

Dated June 6th, 1946.

Homer H. Berger,
1701 Bryant Building,
Kansas City, Missouri,
William H. Curtis,
1701 Bryant Building,
Kansas City, Missouri.

SEC. 3.

In the District Court of the United States for the Western District of Missouri, Western Division. Edward Vance, Plaintiff, vs. American Society of Composers, Authors and Publishers, et al., Defendants. No. 4139.

Suggestions in Support of Motion of Jenkins Music Company to Dismiss Complaint.

This motion is filed under the Rules of Civil Procedure, Rule 12(b), for the District Courts of the United States because,

1. The complaint fails to state a cause of action against this defendant;

2. This Court does not have any original jurisdiction of this character of action, or of the parties; and

3. The complaint fails to comply with Rule 8(e)(1), Rules of Civil Procedure for the District Courts of the United States.

The plaintiff has described at great length alleged violations by the defendants of the anti-trust laws, but he has failed to show any causal connection between these alleged violations and the damages alleged to have been sustained by him. The plaintiff in essence presents two separate and distinct conspiracies. The first conspiracy alleged is one for the purposes of price fixing, discrimination, monopoly and general restraint of trade. The second conspiracy alleged is one for the purpose of appropriating the plaintiff's property rights in two lyrics. However, the only damage alleged to have been sustained by the plaintiff arose solely from the appropriation or piracy of his lyrics, and there is no allegation that the plaintiff has suffered any particular injury as a result of the alleged

conspiracy to monopolize or restrain trade among the several states in violation of the anti-trust laws. In *Glenn Coal Co.* v. *Dickinson Fuel Co.*, 72 F. 2d 885 (1934), the court stated at page 887:

> "To recover, the plaintiff must establish two things: (1) a violation of the Anti-Trust Act and (2) damages to the plaintiff proximately resulting from the acts of the defendant which constitute a violation of the Act. In a civil suit under this section, the gist of the action is not merely the unlawful conspiracy or monopolization or attempt to monopolize interstate commerce in the particular subject matter, but is damage to the individual plaintiff resulting proximately from the acts of the defendant which constitute a violation of the law. A mere conspiracy with intent to violate the law while it may be the basis of a valid indictment under the criminal sanction of the Anti-Trust Act, does not give rise to a personal civil suit for damages.
>
> "Thus it has been held in numerous federal decisions that in a civil suit under this special Act the declaration must allege facts from which the court can determine that there has been a violation of the Act with resultant damage proximately caused thereby to the plaintiff."

And in *Twin Ports Oil Co.* v. *Pure Oil Co.*, 46 F. Supp. 149 (1942), at page 152, the court said:

> "At the outset, it must be recognized that, in every violation of the Sherman Act, there is no legal or logical inference that someone has sustained recoverable damages in a civil action. A conspiracy under the Act may afford the Government the right to injunction or to the prosecution of criminal proceedings, but it does not necessarily follow that everyone who did business with the conspirators during the period were damaged, so as to enable them to recover in a civil proceeding. Every well-considered decision rec-

ognizes that the fact of damage must be established by clear and satisfactory evidence, while the amount of damage may be approximated if the fact of damage appears with reasonable certainty and definiteness. *Palmer et al.* v. *Connecticut Railway & Lighting Co.*, 311 U. S. 544, 61 S. Ct. 379, 85 L. Ed. 336; *Calkins* v. *F. W. Woolworth Co.*, 8 Cir., 27 F. 2d 314; *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U. S. 555, 51 S. Ct. 248, 75 L. Ed. 544; *Twin Ports Oil Co.* v. *Pure Oil Co.*, 8 Cir., 119 F. 2d 747. In view, therefore, it would seem that a complaint under the Act should set forth with reasonable definiteness the facts from which damages are logically and legally inferable. * * *"

Assuming, but not admitting, that the defendants are engaged in a conspiracy to restrain trade among the several states, the plaintiff has not shown any damage resulting therefrom to him that differs from the harm caused to the public in general. To the best of defendant's understanding the sole cause of any special damage to the plaintiff was the alleged appropriation or conspiracy to appropriate the two lyrics claimed by plaintiff as his property. However, such a conspiracy or appropriation, even if proven, would not constitute a violation of the anti-trust laws, for this is a private dispute in which the public has no interest. In *Arthur* v. *Kraft-Phenix Cheese Corporation*, 26 F. Supp. 824 (1937), the court stated at pages 825 and 826:

"Taken as a whole the declaration discloses only what seems to be a private controversy rather than one affecting the public as such. It is well established that the principal purpose of enacting the Anti-trust Laws, 15 U. S. C. A., Sec. 1 *et seq.*, was to protect the public; and the right of an individual to sue for personal damages sustained is incidental and subordinate. That is to say, Congress was concerned

with preventing activities in interstate commerce which were prejudicial to the public and therefore the scope of the Act even in authorizing the personal right of private suit by a person particularly injured was only incidental to the main object and the private suits are maintainable only when the defendant's conduct prejudicially affects the public generally as distinct from purely personal or private damage. * * *"

And in *Mitchell Woodbury Corporation* v. *Albert Pick-Barth Co., Inc., et al.*, 36 F. 2d 974 (1929), at page 977 the court stated:

> "The allegations of the declaration would seem to reveal rather a private injury which the plaintiff had sustained as a result of alleged wrong, having no public significance whatever, and having no direct or material bearing upon interstate commerce. A 'statute intended to reach and suppress real interferences with the free flow of commerce among the states' ought not to be extended to a situation such as is presented by plaintiff's statement of its claim. *Industrial Ass'n* v. *United States, supra.*"

It is submitted by this defendant that plaintiff's failure to allege a cause of action under the anti-trust laws precludes him from recovery in this Court.

He cannot proceed upon a theory based upon any violation of his common law rights because this Court would then lack jurisdiction of the subject matter and of the parties. Under such a theory the Court would lack jurisdiction because the action would not be brought under the constitution or laws of the United States, or any treaties, and the controversy would not be between citizens of different states. There is no allegation in the complaint of diversity of citizenship, and in truth and in fact there is no diversity of citizenship between this defendant and the plaintiff as they are both residents of the

State of Missouri. Although the existence of these facts, in order to give the Court jurisdiction, are so well established that no reference to cases is necessary, the Court's attention is called to the recent case of *Chaskin* v. *Thompson*, 143 F. 2d 566, 567-568, Circuit Court of Appeals of the Ninth Circuit, in which the court discusses the necessity of the complaint alleging the necessary Federal questions to give the court jurisdiction.

The defendant wishes to call to the attention of the Court that upon two previous occasions this plaintiff has harassed the defendant with petitions alleging conspiracy, fraud, and deceit in the appropriation and piracy of the same lyrics involved in the present action. These two previous actions were brought in this Court and were entitled Edward Vance vs. American Society of Composers, Authors, and Publishers *et al.*, No. 1930, and Edward Vance vs. American Society of Composers, Authors, and Publishers *et al.*, No. 2006. Except for his allegations of violations of the anti-trust laws in the present complaint the plaintiff's earlier petitions contain essentially the same charges as the present complaint. The defendant submits that the plaintiff, having failed in these previous actions, is apparently alleging violations of the anti-trust laws for the sole purpose of attempting to give the Court jurisdiction over this defendant.

Rule 8(e)(1) of the Rules of Civil Procedure for the District Courts of the United States has not been complied with because the averments of the pleading are not simple concise, and direct. The entire complaint is so confusing that this defendant cannot accurately determine the exact nature of the charges against it. While no specific allegations are made against this defendant, the plaintiff includes in his complaint attacks against Post Office officials, officials of the Copyright Office, and

other persons who are not made parties to this action. The indefiniteness of the complaint is too apparent to require further discussion.

This defendant has no desire to deny the plaintiff his day in court if he has a just controversy within the jurisdiction of this Court. However, the defendant should not be burdened with the expense and inconvenience of attempting to disprove a multitude of vague and indefinite charges. The rules of the Court are made for the benefit of all parties, and the plaintiff's ignorance of these rules or refusal to obey them should not justify his failure to comply. For these reasons we submit that this complaint should be dismissed.

This defendant requests oral argument on this motion.

Respectfully submitted,

Homer H. Berger,
William H. Curtis,
Attorneys for Defendant Jenkins Music Company.

SEC. 4.

In the District Court of the United States for the Western Division of the Western District of Missouri. Edward Vance, Plaintiff, vs. American Society of Composers, Authors and Publishers et al., Defendants. Civil Action No. 4139.

Motion of Defendants Named Herein to Dismiss and to Quash Return of Service and for Appropriate Orders and Relief.

1. Defendants, American Society of Composers, Authors and Publishers, Deems Taylor, George W. Meyer,

Max Dreyfus, Shapiro, Bernstein and Company, Inc., Edwin H. Morris and Company, Inc., Martin Meltzer, Dick Howard, Bob Ellsworth, Russ Morgan, Curt Massey and Arbie Gibson, appear specially for the purpose of this motion only and move to quash the returns of service upon them and to dismiss the complaint herein because this court has no venue of this action, and because of invalid and insufficient attempted service of process upon them, which does not confer jurisdiction on the court over their person, and because the complaint states no claim against them for the relief prayed for or any relief, for the reasons hereinafter stated.

2. Defendants Maurice J. O'Sullivan and Hudson R. Morton jointly move to dismiss said complaint for all of the reasons hereinafter stated.

3. Plaintiff has heretofore filed three previous similar actions in this court involving and concerning the same matters and facts, as shown by the records of this court in the following numbered cases, the pleadings, affidavits filed, and orders in all of which are adopted by reference for brevity, under Rule 10, to-wit:

Civil Action No. 1930, involuntary dismissal entered September 13th, 1944.

Civil Action No. 2006, involuntary dismissal entered on October 10th, 1944.

Civil Action No. 3308, voluntary dismissal entered on June 30th, 1945.

4. The nature of said three prior actions and of the complaint now filed herein is further shown by letter of plaintiff, of which the following is a true and correct copy, to-wit:

"Independence, Missouri,
R. I. Box 191-C,
December 6, 1945.

Mr. Maurice J. O'Sullivan,
700 Columbia Bank Building,
Kansas City, Missouri.

Dear Sir:

When I filed my three petitions in the United States District Court, you made your replies explaining your conceptions of the disposition of all the defendants. I trust that this will be sufficient notice that the United States Department of Justice, has determined the nature of my complaint; by saying that it is similar to the United States complaint of 1941 against the American Society of Composers, Authors and Publishers, in which judgment was rendered as a consent decree; under the Anti-Trust Law.

As a matter of public policy I shall invite the United States, through its congress to refer my complaint to the proper court; and join me or oppose me in the prosecution of this case. I shall file suit under the Anti-Trust Law; and therein prove the ineffectiveness of this decree by consent striking at the very basis of ASCAP'S existence, using the two songs and three lyrics I composed as basis of my suit.

Through you I am letting your clients know that they are working a monopoly violating the Sherman Act, approved July 2, 1890, entitled 'An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies.' I wish to inform you that this letter is in compliance with my open and above board-policy in which I have always informed your clients of my intentions before acting.

The Department of Justice, sent me a copy of the United States Complaint, and the Consent Decree, publication number 76068. I know of discrimination in ASCAP'S business transactions in the Western Judicial District of the State of Missouri, which

violates this decree by consent. Your actions and theory in your replies to my three petitions I hold to be in contempt of the court. The American Society of Composers, Authors and Publishers, are doing business in the State of Missouri in violation of the Missouri Statute; section 11692, Revised Statute 1929.

I trust that you understand my sincerity and I assure you that there will be a rendition of judgment in this case as quick as federal judicial procedure will expedite.

Yours for justice in law,

Edward Vance,
Plaintiff and attorney for self."

5. Defendants Deems Taylor, George W. Meyer, Max Dreyfus, Shapiro, Bernstein and Company, Inc., Edwin H. Morris and Company, Inc., Dick Howard, Bob Ellsworth, Russ Morgan, Curt Massey and Arbie Gibson are not now and never have been residents or inhabitants of Missouri, and do not carry on or transact business nor have an office or place of business therein.

6. That the only office and place of business maintained by the American Society of Composers, Authors and Publishers in this State is located at 3615 Olive Street, St. Louis, Missouri, in the Eastern Judicial District of Missouri, where a summons was served by leaving a copy of the summons and complaint with a person in charge of said office and place of business.

7. That it has no office or place of business within the Western District of Missouri.

8. That plaintiff is not entitled to maintain this action against said American Society of Composers, Authors and Publishers, in the Western District of Missouri, because of improper venue as to said defendant, and that

the purported service of summons upon said defendant outside of this District and in the Eastern District of Missouri is without warrant or authority of law and does not confer jurisdiction of the person of said defendant on this court and does not authorize this court to exercise venue of this action outside of the Judicial District in which said defendant maintains an office and place of business.

9. The Court has no jurisdiction of the subject matter of plaintiff's alleged action because it appears from the face of the complaint filed herein that plaintiff is a citizen and resident of Jackson County, Missouri, in this District and State, and that defendants Morton and O'Sullivan and defendant Jenkins Music Company are all citizens and residents of this District and State.

10. No controversy is presented by plaintiff which is wholly between citizens of different states or which is cognizable by this Court under Title 28, Section 41, U. S. C. A. as amended.

11. Said complaint does not state facts sufficient to authorize the relief prayed for or any relief against these defendants or any of them, and does not state a cause for which any relief may properly be granted against these defendants or any of them.

12. The complaint (pp. 7, 8, par. f) shows on its face that any alleged action of plaintiff is barred by Section 1014, R. S. Mo., 1939, in that his alleged claims, if any, accrued and arose out of matters occurring long prior to five years before the filing of said complaint.

13. Said alleged claims are affirmatively barred by three successive dismissals of prior actions which operate and have the force and effect of adverse adjudications thereof upon the merits.

Wherefore, the defendants named each pray the judgment of the court and for proper orders granting them appropriate separate relief from further vexatious actions by plaintiff.

Maurice J. O'Sullivan,
John G. Killiger, Jr.,
700 Columbia Bank Building,
Kansas City, Missouri,
Attorneys for defendants
named herein.

Memorandum in Support of Above Motion.

A.

The plaintiff expressly alleges that he resides in and is a citizen of Jackson County, Missouri, and that defendants Maurice J. O'Sullivan, Hudson R. Morton and Jenkins Music Company are citizens and residents of Jackson County, Missouri.

There is therefore no ground of jurisdiction under 28 U. S. C. A., Sec. 41, Judicial Code, Sec. 24. No facts are averred which even remotely tend to state a claim or cause of action in favor of plaintiff against any of defendants under the Sherman or Clayton Acts. We adopt, without repeating, the cases cited by counsel in their memorandum filed for Jenkins Music Company on the allegation required to state a claim thereunder by an individual.

We quote the following from *Thompson* v. *Moore*, (C. C. A. 8) 109 F. 2d 372, 373:

> "* * * (2, 3). If the 'actual controversy is between a citizen of Arkansas on one side, and another citizen of Arkansas and appellants on the other side jointly, the district court was without jurisdiction. Federal courts have jurisdiction over 'Controversies * * * between citizens of different States' (U. S. C. A.,

Constitution, Art. III, Sec. 2; Judicial Code, Sec. 24, 28 U. S. C. A., Sec. 41), but this does not mean a 'controversy between citizens of the same state and citizens of another state.' *Sweeney* v. *Carter Oil Company*, 199 U. S. 252, 256, 26 S. Ct. 55, 56, 50 L. Ed. 178; *Treinies* v. *Sunshine Min. Co.*, 308 U. S. 66, 67, 71, 60 S. Ct. 44, 84 L. Ed. 85.

"(4) The character of the controversy in this case depends upon the situation of the parties at the time of the commencement of the action as disclosed by the allegations of the complaint and the uncontradicted allegations of the plea in abatement. *Salem Trust Company* v. *Manufacturers' Finance Co.*, 264 U. S. 182, 44 S. Ct. 266, 68 L. Ed. 628, 31 A. L. R. 867; *Royalty Service Corp.* v. *City of Los Angeles*, 9 Cir., 98 F. 2d 551; *Ford Bacon & Davis* v. *Valentine*, 5 Cir., 64 F. 2d 800. * * *"

None of the other defendants except those heretofore named as residents of Missouri have an office or place of business in the State of Missouri, so far as known, except the American Society of Composers, Authors and Publishers, which maintains an office in St. Louis, Missouri. It has no office or place of business in the Western District of Missouri.

There is no proper venue as to American Society of Composers, Authors and Publishers. There is no statutory authority for service of a summons upon it in the Eastern District of Missouri.

B.

Service of process upon non-residents "not found" within the District is invalid.

Plaintiff apparently believes that he might surmount his three prior failures to summon defendants from all parts of the United States by invoking the Sherman and Clayton Acts. In civil suits for damages by private liti-

gants, venue is limited to the district in which the defendants are inhabitants, or in which they may be found or are transacting business.

Sherman Anti-Trust & Clayton Acts, 15 U. S. C. A., Sec. 1, *et seq.*

Clayton Act, 15 U. S. C. A., Sec. 26.

Jud. Code, Secs. 51-57, 28 U. S. C. A., Secs. 112-118.

Fed. Rules C. P., Rule 4 (f), 28 U. S. C. A., following Sec. 723c.

In the very recent case of *Orange Theatre Corporation* v. *Rayhertz Amusement Corporation,* 139 F. 2d 871 (cer. den. 322 U. S. 740, 88 L. Ed. 1573), an action for treble damages and equitable relief was filed in the Federal District Court for the District of New Jersey. It was held that process served on individual defendants in the southern and eastern districts of New York was unauthorized and was properly quashed and that the complaint was properly dismissed for want of venue as to such defendants.

In *Westor Theatres* v. *Warner Bros.*, 41 Fed. Supp. 757, after a careful analysis of the question, the court held that the failure of Congress to extend the provisions of the Sherman and Clayton Acts permitting non-resident co-conspirators to be brought into court in suits instituted by the United States, implied an intention to withhold such privilege in all civil suits brought by private litigants.

C.

The complaint should be dismissed with prejudice because it is vexatious and states no claim for which relief may be granted, and because of the dismissals of three prior actions and the bar of limitations.

This is the fourth case filed by plaintiff in which the three defendants of this district have been required to

appear and plead. Most of the non-resident defendants have been named in the prior actions, although some of them have heretofore been omitted. The prior dismissals (one voluntary and two involuntary) operate under the Federal Rules of Civil Procedure as an adjudication upon the merits, so for that reason alone no claim is stated against those joined in the prior actions for which relief may be granted. While defendant counsel readily concedes that he has less reason to complain than those for whom he appears, nevertheless, repetition in employing an attorney for the same matter eventually becomes monotonous even for the best of clients.

The gravamen of plaintiff's complaints are two musical compositions which he asserts were appropriated by others claiming as authors before or in 1940, although he was the original author (Complaint pp. 7, 8, Par. f). If his claim was true, his right of action accrued more than five years prior to the time of filing the present complaint. The law of the forum governs. Tort actions are barred by limitation after five years from the accrual of a cause of action under the Missouri statute cited in the motion. Numerous state and federal cases rule that the bar of limitation may be raised by motion to dismiss where it appears from the face of the complaint.

In addition to the cases cited in the memorandum for Jenkins Music Company as to the insufficiency of the complaint to aver facts sufficient to constitute a claim for which relief may be granted, *Alden-Rochelle, Inc.*, v. *American Society of Composers, Authors and Publishers*, 3 F. R. D. 157, also an action for treble damages, is cited because many parts of the complaint appear to be copied from the complaint in the so-called "consent decree" case. In the Alden-Rochelle case, the court held that the consent decree and judgment obtained on a plea of "*nolo con-*

tendere" were not "*prima facie*" evidence against defendants in a subsequent civil action and that on defendant's motion references to the decree and judgment were required to be stricken from the complaint.

Affidavits filed in the prior cases clearly establish that none of the non-resident defendants are doing business in and that they are not to "be found" in this district. We believe that they may be properly referred to and adopted by reference under Rule 10. Additional affidavits will be procured if they are believed to be required. The burden rests upon the plaintiff in any event to establish jurisdiction. The complaint and returns of service of process outside of the district indicate that the non-resident defendants are not subject to the jurisdiction of this district.

We respectfully submit that appropriate separate relief should be granted as prayed in the foregoing motion.

Maurice J. O'Sullivan,
John G. Killiger, Jr.,
700 Columbia Bank Building,
Kansas City, Missouri,
Attorneys for Defendants named.

I hereby certify that a copy of the foregoing motion and suggestions were duly deposited in the United States mails on June 7th, 1946, at Kansas City, Missouri, with proper United States postage affixed thereto, addressed as follows: "Mr. Edward Vance, R. F. D. Box No. 191-C, Independence, Missouri."

Maurice J. O'Sullivan,
Attorney for Defendants named.

SEC. 5.

In the District Court of the United States for the Western Division of the Western District of Missouri. Edward Vance, Plaintiff, vs. Music Publishers Protective Association, Inc., et al., Defendants. Civil Action No. 4139.

Motion of Defendant, Music Publishers Protective Association, Inc., to Dismiss This Cause and to Quash the Return of Service.

1. Comes now the Music Publishers Protective Association, Inc., and appears specially for the purpose of this motion only and moves to quash the return of service upon it and to dismiss the complaint herein because this cause has no venue of this action, and because of invalid and insufficient attempted service of process upon it, which does not confer jurisdiction on the court over it, and for the further reason that the complaint states no claim against it for the relief prayed for or for any relief, for the reasons hereinafter set forth.

2. Defendant, Music Publishers Protective Association, Inc., is a corporation organized and existing under the laws of the State of New York and has no office or place of business in the State of Missouri, or within the Western District of Missouri.

3. That plaintiff is not entitled to maintain this action against said Music Publishers Protective Association, Inc., in the Western District of Missouri, because of improper venue as to this defendant, and that the purported service of summons upon said defendant outside of this District is without warrant or authority of law and does not confer jurisdiction as to said defendant on this court and does not authorize this court to exer-

cise venue in this action outside of the judicial District in which said defendant maintains an office and place of business.

4. The defendant, Music Publishers Protective Association, Inc., further states that the court has no jurisdiction of the subject matter of plaintiff's alleged action because it appears upon the face of the complaint that the plaintiff is a citizen and resident of Jackson County, Missouri, in this District and State, and that the defendants, Morton and O'Sullivan, and defendant, Jenkins Music Company, are all citizens and residents of this District and State, and for said reason there is no controversy herein which is wholly between citizens of different states or which is cognizable by this court under Title 28, Section 41, U. S. C. A., as amended.

5. Said complaint does not state facts sufficient to authorize the relief prayed for or any relief against this defendant, and does not state a cause for which any relief may properly be granted against this defendant.

6. The complaint shows on its face that any alleged action of plaintiff is barred by Section 1014, Revised Statutes of Missouri, 1939, in that his alleged claims, if any, accrued and arose out of matters occurring long prior to five years before the filing of this complaint.

7. Defendant, Music Publishers Protective Association, Inc., further states that plaintiff's alleged claims are barred by the three successive dismissals of prior actions involving exactly the same matters, which dismissals have the force and effect of adverse adjudications upon the merits.

8. Defendant, Music Publishers Protective Association, Inc., further states that this complaint does not

comply with said rules of Civil Procedure and especially Rule 8 thereof.

Wherefore, this defendant prays an order of the court dismissing said cause as to the defendant, Music Publishers Protective Association, Inc.

T. James Conway,

Attorney for defendant,
Music Publishers Protective Association, Inc.

I have today mailed a copy of the foregoing motion and suggestions to the plaintiff at the address given at the bottom of his petition.

Dated June 7, 1946.

T. James Conway,

Attorney for defendant,
Music Publishers Protective Association, Inc.

EXHIBIT A.

SEC. 6.

In the District Court of the United States for the Western District of Missouri Western Division Edward Vance, Plaintiff, -vs- American Society of Composers, Authors And Publishers, et al, Defendants. No. 4139.

Order Sustaining Separate Motions of Defendants to Dismiss Unless Plaintiff Amends His Pleading to Comply with Rule 8.

This cause is pending upon the separate motions of several defendants to dismiss. Those motions present several questions—only one of which need be considered. In all of the motions it is contended that the complaint

does not comply with Rule 8 of the Rules of Civil Procedure which requires that the pleadings shall contain a short and plain statement of the grounds upon which the Court's jurisdiction depends and a short and plain statement of the claim showing that the pleader is entitled to relief. This contention must be sustained.

Great liberality is indulged in the application of Rule 8 of our Rules of Procedure. Especially has that been the practice when a party is without legal counsel but occasions arise when too extreme liberality in that regard ceases to operate as a consideration for a party who is without counsel and becomes actually prejudicial to his best interests. This is such a case. The plaintiff undertakes to allege a cause of action of a complicated nature If, perchance, without experience in the drawing of such pleadings of the character he attempts, he should incorporate all of the essential allegations to a statement of a cause of action he would then be confronted with the burden of preparing his case for trial, the subpoena of necessary witnesses, the arrangement of his evidence in such a manner as to be fairly understandable, and many other problems which in some cases present slight difficulty but in cases of this character would not be reasonably possible to be accomplished by a layman. Hence, considerations of charity prompt the enforcement of Rule 8 at this time before great expense has been incurred.

Indulging great liberality in the application of Rule 8, still the complaint does not measure up to the reasonable requirements of that Rule. Hence, the motions must be sustained upon that ground unless the plaintiff within 10 days from this date amends his petition to comply with Rule 8.

The plaintiff is not required to have counsel. His rights will be protected in the absence of counsel to the

fullest extent which he makes possible but the Court cannot draft his pleadings nor try his case for him. It is therefore suggested that the plaintiff consider seriously the desirability of engaging competent counsel. The Clerk will notify the plaintiff of this Order by mailing a copy thereof to him at his address appearing on the complaint.

J. C. Collett
District Judge.

Dated at Kansas City, Mo., this 19th day of June, 1946.

SEC. 7.

In the District Court of the United States for the Western District of Missouri, Western Division. Edward Vance, Plaintiff, vs. American Society of Composers, Authors and Publishers et al., Defendants. Civil Action No. 4139.

Amended Pleadings.

Plaintiff for his amended complaint served pursuant to an order of this Court dated June 19, 1946, alleges:

1. Jurisdiction; That this action arises under the Act of July 2, 1890, entitled, "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies," and the Acts Amendatory thereof and Supplemental thereto, Title 15, Section 1, U. S. C. A., Title 28, Section 41, U. S C. A. Judicial Code 24, Amended, Rule 12, of Civil Procedure, and Missouri Statute, Section 13313, revised 1939; Defendant Society is an unincorporated association operating under the State Laws of New York; Defendant Deems Taylor, is an individual citizen of the State of New York; Defendant George W. Meyer, is an individual citizen of the State of New York; Defendant Max Dreyfus, is an individual citizen of the State of New

York; Defendant Shapiro, Bernstein and Comped, corporated, operates under the State Laws of Ne nt Defendant Edwin H. Morris and Company, Incor er operates under the State Laws of New York; D rs Jenkins Music Company, Incorporated, operate of the State Laws of Missouri; Defendant Music P ual Protective Association, operates under the State J. New York; Defendant Martin Meltzer, is an i is- citizen of the State of Missouri; Defendant Ma it- O'Sullivan, is an individual citizen of the State is souri; Defendant Hudson R. Morton, is an indivi nd- izen of the State of Missouri; Defendant Dick H ate an individual citizen of the State of New York; ant Bob Ellsworth, is an individual citizen of t ual of New York; Defendant Russ Morgan, is an i ey, citizen of the State of California; Defendant Curt nd- is an individual citizen of the State of California; ate ant Arbie Gibson, is an individual citizen of t the of California; The plaintiff is an individual citiz ens State of Missouri; The controversy is between ing of different states, four defendants and plaintg u- citizens of the State of Missouri; This action is and late trade and commerce among the states, enjoi gly restraining the defendants from knowingly and i o- maintaining an illegal combination and conspira ti- lation of Section 1, and Section 7, of the Sherm Trust Law.

the

2. Claim of Relief: For the last seven y ing plaintiff has been engaged in the business o and songs and sending them to publishers to be publ om- copyrighted and to be used in interstate trade e ral merce; September 2, 1940, plaintiff mailed t me- manager of defendant Society a copy of his son to body Else Is Taking My Place," and was com

write the general manager of defendant Society asking what service, if any, could the Society give on this said song; the reply was discouraging and defendant did not send back plaintiff's copy of his said song, then plaintiff mailed a copy of the same said song to Russ Morgan, together with a copy of plaintiff's revised copy of his song "Honey I'm in Love With You" and received no reply from defendant Russ Morgan; October 5, 1941, plaintiff mailed a copy of his original song "Honey I'm In Love With You" To Okeh Recording Company, receipt was acknowledged by defendant Arbie Gibson; September, 1942, plaintiff discovered his two songs on the market with five different authors' names signed to them, and being circulated by defendant Society all over the world; the plaintiff was led to trust defendant Society and its members by having read propaganda literature of defendant Society circulating through the public libraries, and this trust was betrayed by treachery of defendant Society, in publishing, copyrighting, licensing, selling and changing title to plaintiff's two songs, with all members of defendant Society relying upon defendant Society for protection from being prosecuted for their illegal operations; Defendant Society has been for more than thirty years and is now operating all over the United States and particularly in the Western Judicial District of Missouri, under the pretense of enforcing that particular right inherent in musical copyright; That the Copyright Law of the United States, does not authorize such combine in restraint of trade and commerce, restraining published music, motion pictures, recordings, electrical transcriptions, radio broadcasting, and television, through unlawful licensing of grand right of licensing for public performance for profit, unlawful use of mails, unlawful claims of copyright, and unlawful claims of authorship, in violation of Section 1, and Section 7, of

Sherman Anti-Trust Law, Title 15, Section 1, U. S. C. A., and in violation of Missouri Statute, Section 13313, revised, 1939, and in violation of Postal Laws, and in violation of the Copyright Law of the United States, Sections 17 and 36; injuring the public and plaintiff; The plaintiff sets forth his federal right in order to set forth his cause of action and to gain security in his business and property in the future; The plaintiff's injury being a character injury, restraining the plaintiff's rights in his business and property, causing the plaintiff much grief and disappointment, by taking from the plaintiff the fruits of his labor, which acts are the subject of replevin and traverse, and due to the illegal exploitation of the plaintiff's literary property by defendants collecting royalties under a blanket system, based on seating capacity and other variable conditions, no definite set amount of damages can be arrived at by the plaintiff or the defendants, but, considering the time the two said songs have been remaining on the productive market, the two songs have earned in royalties alone more than three hundred thousand dollars, $300,000 plus interest, which amount is loss to the plaintiff.

Edward Vance,
Plaintiff,
R. 1, Box 191-C,
Independence, Missouri,
Attorney for self.

To All Attorneys for Defendants:

Please take notice that plaintiff demands trial by jury of all issues so triable.

Edward Vance,
Plaintiff,
R. 1, Box 191-C,
Independence, Missouri,
Attorney for self.

SEC. 8.

In the District Court of the United States for the Western District of Missouri, Western Division. Edward Vance, Plaintiff, vs. American Society of Composers, Authors and Publishers et al., Defendants. No. 4139.

Motion of Defendant Jenkins Music Company to Dismiss.

Comes now Jenkins Music Company and moves the Court to dismiss the above cause as to this defendant for the following reasons, to wit:

(1) because of the failure of petitioner to state a claim against this defendant upon which relief can be granted;

(2) because of lack of jurisdiction of the subject matter or of this party defendant for the reason that the plaintiff's amended pleadings recite that the plaintiff is a citizen of the State of Missouri, and the fact is that defendant Jenkins Music Company is a Missouri corporation with its principal place of business in Kansas City, Missouri; and

(3) because the amended pleadings do not comply with the rules of civil procedure, and especially Rule 8.

Wherefore, this defendant prays an order of this Court dismissing said cause as to defendant Jenkins Music Company.

Homer H. Berger,
1701 Bryant Building,
Kansas City, Missouri,

William H. Curtis,
1701 Bryant Building,
Kansas City, Missouri,

Attorneys for Defendant Jenkins Music Company.

We have today mailed a copy of Motion and Suggestions to the Plaintiff at the address given at the bottom of his petition.

Dated July 3, 1946.

Homer H. Berger,
1701 Bryant Building,
Kansas City, Missouri,
William H. Curtis,
1701 Bryant Building,
Kansas City, Missouri,

In the District Court of the United States for the Western District of Missouri, Western Division. Edward Vance, Plaintiff, vs. American Society of Composers, Authors and Publishers et al., Defendants. No. 4139.

Suggestions in Support of Motion of Jenkins Music Company to Dismiss Complaint.

This motion is filed under the Rules of Civil Procedure, Rule 12(b), for the District Courts of the United States because,

1. The complaint fails to state a claim against this defendant upon which relief can be granted;

2. This Court did not have any original jurisdiction of this character of action, or of the parties; and

3. The complaint fails to comply with Rule 8(a)-(2) and Rule 8(e)(1), Rules of Civil Procedure for the District Courts of the United States.

In his amended petition plaintiff fails to allege any act on the part of defendant Jenkins Music Company in violation of the plaintiff's rights or in violation of the Sherman Anti-trust Act. The only reference to this defendant is the statement that defendant Jenkins Music

Company operates under the state laws of Missouri. A general statement or conclusion is made that the defendants are maintaining an illegal combination and conspiracy in violation of the Sherman Anti-trust Law, but there is no allegation of any overt act or of any connection whatsoever of this defendant with the alleged violation. The purpose of any petition is to advise the defendant of the wrongs he is alleged to have committed in order that he may be fairly accorded an opportunity to defend himself. The defendant Jenkins Music Company submits that it should not be required to answer a petition which fails completely to specify any acts by it which might be construed to be in violation of the plaintiff's rights and which even lacks any indication of the reason for its being listed as a defendant in this action.

The petition does not allege any facts which might confer upon this Court jurisdiction of the subject matter of this action or of the parties defendant. It is apparent on the face of the petition that the Court's jurisdiction cannot be based upon diversity of citizenship because plaintiff states therein that four of the defendants, including defendant Jenkins Music Company, and the plaintiff are citizens of the State of Missouri. The attention of the Court is called to the case of *Thompson* v. *Moore,* 109 F. 2d 372, C. C. A. 8th Circuit, in which it was held that federal courts do not have jurisdiction because of diversity of citizenship unless all of the parties defendant are of citizenship diverse from that of the plaintiff.

Moreover the Court does not obtain jurisdiction by reason of the plaintiff's statement that the action arises under the laws of the United States. The mere general allegation that the defendants are violating the Sherman Anti-trust Laws is not sufficient in itself to confer jurisdiction. The plaintiff must allege acts by the defendants

which, if proven, would constitute violations of the law with resulting damage to him. This he has failed to do. No act which would constitute a conspiracy or combination in restraint of trade among the states is alleged. In *Glenn Coal Co.* v. *Dickinson Fuel Co.*, 72 F. 2d 885 (1934), the court stated at page 887:

> "To recover, the plaintiff must establish two things: (1) a violation of the Anti-Trust Act and (2) damages to the plaintiff proximately resulting from the acts of the defendant which constitute a violation of the Act. In a civil suit under this section, the gist of the action is not merely the unlawful conspiracy or monopolization or attempt to monopolize interstate commerce in the particular subject matter, but is damage to the individual plaintiff resulting proximately from the acts of the defendant which constitute a violation of the law. A mere conspiracy with intent to violate the law while it may be the basis of a valid indictment under the criminal sanction of the Anti-Trust Act, does not give rise to a personal civil suit for damages.
>
> "Thus it has been held in numerous federal decisions that in a civil suit under this special Act the declaration must allege facts from which the court can determine that there has been a violation of the Act with resultant damage proximately caused thereby to the plaintiff."

To the best of this defendant's understanding of the Amended Pleadings the sole cause of any damage to the plaintiff was the alleged appropriation by defendants other than defendant Jenkins Music Company of two songs claimed by the plaintiff as his property. However, there is no allegation that the alleged appropriation had any relation to any alleged violation of the anti-trust laws. In essence this is simply a private dispute in which the public has no interest. It has been repeatedly held that

the anti-trust laws are not concerned with such disputes. In *Arthur* v. *Kraft-Phenix Cheese Corporation*, 26 F. Supp. 824 (1937), the court stated at pages 825 and 826:

> "Taken as a whole the declaration discloses only what seems to be a private controversy rather than one affecting the public as such. It is well established that the principal purpose of enacting the Anti-trust Laws, 15 U. S. C. A. Sec. 1 *et seq.*, was to protect the public; and the right of an individual to sue for personal damages sustained is incidental and subordinate. That is to say, Congress was concerned with preventing activities in interstate commerce which were prejudicial to the public and therefore the scope of the Act even in authorizing the personal right of private suit by a person particularly injured was only incidental to the main object and the private suits are maintainable only when the defendant's conduct prejudicially affects the public generally as distinct from purely personal or private damage. * * *"

It is submitted that the plaintiff's failure to allege a cause of action under the anti-trust laws precludes him from recovery in this Court. The required jurisdictional elements are not presented in the amended petition, because, if any cause of action is stated therein, it is certainly not a cause of action brought under the constitution or laws of the United States, or any treaties, and the controversy is not between citizens of different states. The Court's attention is called to the recent case of *Chaskin* v. *Thompson*, 143 F. 2d 566, 567-568, C. C. A. 9th Circuit, in which the court discusses the necessity of the petition alleging the necessary federal questions to give the court jurisdiction.

Plaintiff's amended petition certainly does not comply with Rule 8(a)(2) and Rule 8(e)(1) of the Rules of

Civil Procedure for the District Courts of the United States because it does not contain a short and plain statement showing that the pleader is entitled to relief, and the averments are not simple, concise and direct. The entire petition is so confusing that this defendant cannot accurately determine the exact nature of the charges against it. Reference is made generally to violation of Missouri Statute, Section 13313, Revised, 1939, violation of the Postal Laws, and violation of the Copyright Law of the United States, which do not in anywise apply to any facts alleged. The indefiniteness of other allegations is too apparent to require any further specification and discussion.

In two previous actions this plaintiff has harassed this defendant with petitions alleging conspiracy, fraud, and deceit in the appropriation of the same songs involved in the present action. Except for the allegations of violations of the anti-trust laws in the present action the plaintiff's earlier petitions contain essentially the same charges as the present petition. These two previous actions were brought in this Court and were entitled *Edward Vance* v. *American Society of Composers, Authors and Publishers et al.*, No. 1930, and *Edward Vance* v. *American Society of Composers, Authors and Publishers et al.*, No. 2006. Both actions were dismissed after several attempts by the plaintiff to make a clear and concise statement of his cause of action and to make satisfactory allegations of jurisdictional grounds. This is the sixth time that this defendant has been burdened with the expense and inconvenience of opposing pleadings composed of a multitude of vague and indefinite charges. This defendant has no desire to deny the plaintiff his day in court, but plaintiff's lack of knowledge of legal procedure and the rules of the court and his continued re-

fusal to obtain professional assistance entitles the defendant to protection against this repeated harassment.

For these reasons we submit that this cause should be dismissed.

Respectfully submitted,

Homer H. Berger,
William H. Curtis,
Attorneys for Defendant
Jenkins Music Company.

SEC. 9.

In the District Court of the United States for the Western Division of the Western District of Missouri. Edward Vance, Plaintiff, vs. American Society of Composers, Authors and Publishers et al., Defendants. Civil Action No. 4139.

Motion of Defendants Named Herein to Dismiss Amended Complaint or So Called "Amended Pleadings" and to Quash Return of Service and for Appropriate Orders and Relief.

1. Defendants, American Society of Composers, Authors and Publishers, Deems Taylor, George W. Meyer, Max Dreyfus, Shapiro, Bernstein and Company, Inc., Edwin H. Morris and Company, Inc., Martin Meltzer, Dick Howard, Bob Ellsworth, Russ Morgan, Curt Massey, and Arbie Gibson, appear specially for the purpose of this motion only and move to quash the returns of service upon them and to dismiss the amended complaint, or so called "Amended Pleadings" filed herein because this court has no venue of this action, and because of invalid and insufficient attempted service of process upon them, which does not confer jurisdiction on the court over their person, and

because the complaint states no claim against them for the relief prayed for or any relief, for all of the reasons stated in their motion heretofore filed herein which is referred to and adopted by reference under F. R. C. P. No. 10. Each paragraph of said original motion is adopted, renewed, and directed to said "Amended Pleadings."

2. Defendants Maurice J. O'Sullivan and Hudson R. Morton jointly move to dismiss said amended complaint, or so called "Amended Pleadings," for all of the reasons stated in their motion heretofore filed which is adopted by reference under Rule 10. Each part thereof is adopted and directed to said "Amended Pleadings."

Wherefore, the defendants named each pray the judgment of the court and for proper orders granting them appropriate separate relief from further vexatious actions by plaintiff.

Maurice J. O'Sullivan,
John G. Killiger,
700 Columbia Bank Building,
Kansas City, Missouri,
Attorneys for defendants named herein.

Memorandum in Support of Above Motion.

The plaintiff expressly alleges on page two of his "Amended Pleadings" that he resides in and is a citizen of Jackson County, Missouri, and that four defendants are citizens and residents of Missouri, to-wit: Jenkins Music Company, and defendants Morton, Metzler and O'Sullivan.

There is therefore no ground of jurisdiction under 28 U. S. C. A., Sec. 41, Judicial Code, Sec. 24, for the reasons stated in, and which by reference are adopted from, the Memorandum filed in support of their original motion to dismiss. No facts are averred which even remotely tend

to state a claim or cause of action in favor of plaintiff against any of defendants under the Sherman or Clayton Acts. We also adopt, without repeating the cases cited by counsel in their memorandum filed for Jenkins Music Company on the allegation required to state a claim thereunder by an individual.

We believe that further argument is superfluous.

Lawful service of process outside of the State and District upon the non-resident defendants is impossible.

There is no jurisdiction of the person of the non-resident defendants.

No claim is stated upon which the court has jurisdiction to grant the relief claimed nor any relief against the resident defendants. No controversy is stated between plaintiff and "citizens of different states" over whom the court may obtain jurisdiction by service of process in the District or State.

Plaintiff's numerous and repeated efforts to create jurisdiction, venue, and a valid claim for relief according to his own ideas are futile and must sometime end.

It is respectfully urged that now should be the appointed time for ending the harassment of defendants which has been reiterated so often that it has now gone beyond the realm of monotony.

Maurice J. O'Sullivan,
John G. Killiger,
700 Columbia Bank Building,
Kansas City, Missouri,
Attorneys for defendants named herein.

SEC. 10.

In the District Court of the United States for the Western Division of the Western District of Missouri. Edward Vance, Plaintiff, vs. Music Publishers Protective Association, Inc., et al., Defendants. Civil Action No. 4139.

Motion of Defendant, Music Publishers Protective Association, Inc., to Dismiss Plaintiff's Amended Complaint and to Quash the Return of Service.

1. Defendant, Music Publishers Protective Association, Inc., appears especially for the purpose of this motion only and moves to quash the return of sevrice upon it, and to dismiss the amended complaint herein because this court has no venue of this action, and because of invalid and insufficient attempted service of process upon it, which does not confer jurisdiction on the court over it, and because the complaint states no claim against it for the relief prayed for, or any relief, and for the reasons stated in its motion heretofore filed, which is referred to and adopted by reference under the Federal Rules of Court Procedure No. 10. Each paragraph of said original motion is adopted, renewed and directed to plaintiff's amended complaint.

Wherefore, the defendant, Music Publishers Protective Association, Inc., asks plaintiff's amended complaint be dismissed and that an order be entered relieving defendant, Music Publishers Protective Association, Inc., from further harassment from this plaintiff.

T. James Conway,

Attorney for Defendant Music Publishers Protective Association, Inc.

I have today mailed a copy of the foregoing motion and suggestions to plaintiff at Box 191-C, Rte No. 1, Independence, Mo.

T. James Conway,

Attorney for defendant, Music Publishers Protective Association, Inc.

Memorandum in Support of Motion of Music Publishers Protective Association, Inc., to Dismiss.

1. There is no question but that the Music Publishers Protective Association, Inc., is a New York corporation, which has no place of business in the State of Missouri, and which does no business in this state. For this reason alone this cause of action should be dismissed as to the above named defendant. In addition, defendant, Music Publishers Protective Association, Inc., submits that there is no connection between the Sherman and Clayton Anti-trust Acts, and the alleged injury to this plaintiff. The defendant, Music Publishers Protective Association, Inc., also adopts, without repeating cases cited therein, the memoranda filed on behalf of the other defendants in this cause.

2. It is impossible for the plaintiff in this cause to maintain any suit in this state and District for the reason that the defendant, Music Publishers Protective Association, Inc., is a non-resident. We submit that this plaintiff should be ordered by the court to desist from filing further complaints, or amended complaints, in this state and District for the reason that the defendants, Music Publishers Protective Association, Inc., has been compelled to waste time, effort and money in defending the various suits brought by this plaintiff, which have no place or standing in the Federal Courts in this District.

T. James Conway,

Attorney for Defendant Music Publishers Protective Association, Inc.

SEC. 11.

In the District Court of the United States for t
District of Missouri, Western Divisio
Vance, Plaintiff, vs. American Society of
Authors and Publishers et al., Defend
Action No. 4139.

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Amended Pleadings.

Plaintiff for his amended complaint ser
form to defendants' pleadings alleges:

o con-

1. Jurisdiction and claim for relief; Tha
arises under the Act of July 2, 1890, entitled
Protect Trade and Commerce Against Unlawfu
and Monopolies," and the Acts Amendatory
Supplemental thereto, Title 15, Section 1,
Title 28, Section 41, U. S. C. A., Judicial Code 2
Rule 12, of Civil Procedure.

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Act to
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C. A.,

2. That defendant American Society of
Authors and Publishers, is an unincorporated
operating under the State Laws of New Yor
business as a Royalty Collecting Agency
dividual member, doing business all over
States and particularly in the Western Dis
souri; that defendant Deems Taylor, presid
fendant George W. Meyer, Secretary; that de
Dreyfus, treasurer; that defendant Shapir
and Company, Incorporated, a music publis
that defendant Edwin H. Morris and Com
porated, a music publisher member; that defe
Music Company, Incorporated, a music publi
that defendant Music Publishers Protective
who are music publisher members; that defe
Meltzer, district manager of the Western Di

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souri; that defendant Maurice J. O'Sullivan, business and legal district representative; that defendant Hudson R. Morton, district representative; that defendant Dick Howard, an author member; that defendant Bob Ellsworth, an author member; that defendant Russ Morgan, an author member; that defendant Curt Massey, an author member; that defendant Arbie Gibson, an author member; are each and all named and described defendants acting in their official capacity and are carrying out the rules and policies of defendant Society, in restraint of interstate trade and commerce.

3. That all members of defendant Society have agreed among themselves to actively and effectively restrain their own activities to eliminate competition among themselves and have created and maintained and utilized defendant Society as an instrumentality unreasonably to restrain and restrict interstate trade and commerce for more than the last five years.

4. In the prosecution of this conspiracy the defendants agreed among themselves to control the music business among the states, by driving competing composers, authors, and publishers out of business.

5. To that end the defendants through defendant Society, have fixed prices, have pooled their musical compositions in an illegal combination, have collected royalties under a blanket system based on seating capacity and other variable conditions, have used the mail to defraud, have made false claims of copyright, have made false claims of authorship, have influenced federal officials in their administrative duties to illegally perform their duties; as a result of this concerted action of defendants, other authors, composers and publishers and the plaintiff have been unable to compete with the defendants;

thereby competition in the music business has been destroyed and a monopoly exists in favor of the defendants. This concerted action on the part of the defendants resulted in limited production and deteriorated quality of musical compositions.

6. That the plaintiff is an individual citizen of the State of Missouri and was actively engaged in the business of writing songs to be used in interstate trade and commerce.

7. That said illegal combination and conspiracy in restraint of interstate trade and commerce, has put many authors, composers, publishers and the plaintiff out of business; the plaintiff's two songs, "Somebody Else Is Taking My Place" and "Honey I'm In Love With You" were acquired and are being used by defendants through defendant Society's coercive and subversive activities, injuring the plaintiff by restraining the plaintiff's rights in his business and property, taking from the plaintiff the fruits of his labor, causing the plaintiff much grief and disappointment. The defendants have collected more than three hundred thousand dollars ($300,000) on the plaintiff's two said songs, which amount is loss to the plaintiff. The plaintiff demands injunctive and money relief.

Edward Vance,
Plaintiff,
R. 1, Box 191-C,
Independence, Missouri,
Attorney for self.

The plaintiff has mailed a true copy of this pleading to the attorneys of record representing all defendants, addressed to the address given on motions to dismiss.

Edward Vance,
Plaintiff,
R. 1, Box 191-C,
Independence, Missouri,
Attorney for self.

SEC. 12.

In the District Court of the United States for the Western District of Missouri, Western Division. Edward Vance, Plaintiff, vs. American Society of Composers, Authors and Publishers et al., Defendants. No. 4139.

Motion of Defendant Jenkins Music Company to Dismiss.

Comes now Jenkins Music Company and moves the Court to dismiss the above cause as to this defendant for the following reasons, to wit:

(1) because the amended pleadings do not comply with Rule 15(a) of the Rules of Civil Procedure;

(2) because of the failure of petitioner to state a claim against this defendant upon which relief can be granted;

(3) because of lack of jurisdiction of the subject matter or of this party defendant for the reason that the plaintiff's amended pleadings recite that the plaintiff is a citizen of the State of Missouri, and the fact is that defendant Jenkins Music Company is a Missouri corporation with its principal place of business in Kansas City, Missouri;

(4) because the amended pleadings do not comply with Rule 8 of the Rules of Civil Procedure; and

(5) because the matters and things complained of in the complaint are *res judicata*, having been heretofore determined adversely to the plaintiff, which order and judgment is final and conclusive upon the matters and things set forth in the complaint.

Wherefore, this defendant prays an order of this Court dismissing said cause as to defendant Jenkins Music Company.

Homer H. Berger,
1701 Bryant Building,
Kansas City, Missouri,
William H. Curtis,
1701 Bryant Building,
Kansas City, Missouri,
Attorneys for Defendant Jenkins Music Company.

We have today mailed a copy of Motion and Suggestions to the Plaintiff at the address given at the bottom of his petition.

Dated July 22, 1946.

Homer H. Berger,
1701 Bryant Building,
Kansas City, Missouri,
William H. Curtis,
1701 Bryant Building,
Kansas City, Missouri.

In the District Court of the United States for the Western District of Missouri, Western Division. Edward Vance, Plaintiff, vs. American Society of Composers, Authors and Publishers et al., Defendants. No. 4139.

Suggestions in Support of Motion of Jenkins Music Company to Dismiss Complaint.

This motion is filed under the Rules of Civil Procedure, Rule 12(b), for the District Courts of the United States because,

1. The amended pleadings do not comply with Rule 15(a) of the Rules of Civil Procedure for the District Courts of the United States;

2. The complaint fails to state a claim against this defendant upon which relief can be granted;

3. This Court did not have any original jurisdiction of this character of action, or of the parties; and

4. The complaint fails to comply with Rule 8(a)(2) and Rule 8(e)(1), Rules of Civil Procedure for the District Courts of the United States;

5. Because the matters and things complained of in the complaint are *res judicata*.

Plaintiff's latest amended pleadings do not conform with Rule 15(a) of the Rules of Civil Procedure because the plaintiff has amended his pleadings without obtaining leave of Court or the written consent of this defendant. Plaintiff is not permitted to amend his pleadings as a matter of course because a responsive pleading to his previous amended petition is permitted and has been served.

The plaintiff in his latest amended pleadings has again failed to state a cause of action under the Sherman Anti-trust Act. In essence his action is merely one to re-

cover damages for the alleged appropriation by defendants of two songs alleged to be the property of the plaintiff. This is not a matter of public interest but is rather a private dispute entirely outside the scope of the anti-trust laws. The courts have repeatedly held that the principal purpose of enacting the anti-trust laws was to protect the public and that private suits are maintainable only when defendant's conduct prejudicially affects the public generally as distinct from purely personal or private damage. *Glenn Coal Co.* v. *Dickinson Fuel Co.*, 72 F. 2d 885, 889; *Arthur* v. *Kraft-Phenix Cheese Corporation*, 26 F. Supp. 824, 825-826.

The plaintiff alleges generally that the alleged illegal combination and conspiracy in restraint of trade resulted in his being put out of business and in his inability to compete with the defendants. However, he states only conclusions and does not allege facts showing any relation between the alleged illegal acts of defendants and his inability to compete. Mere conclusions and general allegations of combination and conspiracy do not support a right of action under the statute. *Tilden* v. *Quaker Oats Co.*, 1 F. 2d 160, 164-165; *Alexander Milburn Co.* v. *Union Carbide & Carbon Corporation*, 15 F. 2d 678, 680 (cert. den., 273 U. S. 757, 47 S. Ct. 459, 71 L. Ed. 876).

Plaintiff states that defendants have fixed prices, pooled their musical compositions in an alleged illegal combination, collected royalties under a blanket system based upon seating capacity and other variable conditions, used the mails to defraud, made false claims of copyright, made false claims of authorship, and influenced federal officials in their administrative duties to illegally perform their duties. Assuming, but not admitting, that these allegations are true, plaintiff has still failed to show how such acts affected his business or destroyed his

ability to compete. He does not even state the extent of his song writing business which was allegedly destroyed. His pleadings merely allege that he "was actively engaged in the business of writing songs to be used in interstate trade and commerce." The inadequacy of such allegations was discussed by the Court in *Jack* v. *Armour & Co. et al.,* 291 Fed. 741, 745. Moreover his amended pleadings do not state when he was in the song writing business or when he was allegedly forced out of that business. There is not even an allegation as to the time when defendants allegedly acquired the two songs claimed by plaintiff as his property.

Plaintiff's failure to state a cause of action under the anti-trust laws deprives the Court of Jurisdiction of this action because no other ground of jurisdiction is alleged. No allegation of diversity of citizenship is made, and in truth and in fact no diversity of citizenship exists, for both the plaintiff and this defendant are citizens and residents of the State of Missouri.

The amended pleadings do not comply with Rule 8(a)(2) and Rule 8(e)(1) of the Rules of Civil Procedure for the District Courts of the United States because they do not contain a short and plain statement showing that the pleader is entitled to relief, and the averments are not simple, concise, and direct. There is no allegation of any overt act on the part of this defendant, and the allegations against the defendants in general are mere conclusions devoid of facts showing violations of the anti-trust laws or resulting damage to plaintiff's alleged business of song writing. Nowhere in the amended pleadings is there any allegation as to when the alleged violations occurred, when the plaintiff's business was allegedly destroyed, when the songs claimed by the plaintiff were allegedly acquired by the defendants, or what the size

or scope of plaintiff's business was when it was allegedly destroyed. The requirements for stating a cause of action under the Sherman Act are ably discussed by the Court in *McJunkin* v. *Richfield Oil Corporation*, 23 F. Supp. 466, 469.

This is the seventh time that this defendant has been burdened with the expense and inconvenience of opposing vague and indefinite charges presented by the plaintiff. Three pleadings have been filed by the defendant in this action and four pleadings were required in two similar previous actions entitled Edward Vance vs. American Society of Composers, Authors and Publishers, *et al.*, No. 1930, and Edward Vance vs. American Society of Composers, Authors and Publishers, *et al.*, No. 2006. Both of the latter two actions were dismissed after several attempts by the plaintiff to make a clear and concise statement of his cause of action and to make satisfactory allegations of jurisdictional grounds, with the exception that the present complaint alleges violation of the anti-trust laws, the allegations in the previous two actions were the same as those in the present action. Defendant submits that under Rule 41(b) of the Rules of Civil Procedure the dismissals of these previous two actions operated as adjudications upon the merits and that the matters complained of in plaintiff's present petition are *res judicata*.

This defendant submits that it is entitled to relief from this repeated harassment.

Respectfully submitted,

Homer H. Berger,
William H. Curtis,
Attorneys for Defendant
Jenkins Music Company.

SEC. 13.

In the District Court of the United States for the Western Division of the Western District of Missouri. Edward Vance, Plaintiff, vs. American Society of Composers, Authors and Publishers et al. Civil Action No. 4139.

Motion of Defendants Named Herein to Dismiss Amended Complaint or So Called "Amended Pleadings" Served to Conform to Defendants' Pleadings and to Quash Return of Service and for Appropriate Orders and Relief.

1. Defendants, American Society of Composers, Authors and Publishers, Deems Taylor, George W. Meyer, Max Dreyfus, Shapiro, Bernstein and Company, Inc., Edwin H. Morris and Company, Inc., Martin Meltzer, Dick Howard, Bob Ellsworth, Russ Morgan, Curt Massey, and Arbie Gibson, appear specially for the purpose of this motion only and move to quash the returns of service upon them and to dismiss the amended complaint, or so called "Amended Pleadings" filed herein and which is stated to be his amended complaint served to conform to defendants' pleadings, because this court has no venue of this action, and because of invalid and insufficient attempted service of process upon them, which does not confer jurisdiction on the court over their person, and because the complaint states no claim against them for the relief prayed for or any relief, for all of the reasons stated in their motions heretofore filed herein which are referred to and adopted by reference under F. R. C. P. No. 10. Each paragraph of said original motions are adopted, renewed, and directed to said "Amended Pleadings."

2. Defendants Maurice J. O'Sullivan and Hudson R. Morton jointly move to dismiss said amended complaint, or so called "Amended Pleadings," for all of the reasons stated in their motions heretofore filed which are adopted

by reference under Rule 10. Each part thereof is adopted and directed to said "Amended Pleadings."

Wherefore, the defendants named each pray the judgment of the court and for proper orders granting them appropriate separate relief from further vexatious actions by plaintiff.

Maurice J. O'Sullivan,
John G. Killiger, Jr.,
700 Columbia Bank Building,
Attorneys for Defendants named herein.

Memorandum in Support of Above Motion.

Plaintiff's latest "Amended Pleadings" does not confer jurisdiction over the person of the non-resident defendants and states no valid claim for relief against the four resident defendants.

In general it is subject to the same defects as his former efforts. The arguments heretofore made will not be repeated but are adopted by reference.

The present amendment does make it obvious that he is not engaged in competition with defendants so as to possibly suffer injury by any alleged monopolistic acts of defendants. The gravamen of this and his prior complaints is that some of defendants are alleged to have acquired and are using two musical compositions of which he claims to be author and composer. His immediately preceding complaint, Page 3, stated that his injury was "by taking from plaintiff the fruits of his labor, which acts are the subject of replevin and traverse."

If he had valid copyrights thereto and the facts are as he claims, his only complaint would be against whoever he claims unlawfully appropriated his compositions, but the action would be for copyright infringement and not alleged violation of the Sherman and Clayton Acts.

We submit that in addition to the jurisdictional matters raised in behalf of all defendants, that the latest amended complaint on its face should be dismissed on the merits.

Maurice J. O'Sullivan,
John G. Killiger, Jr.,
700 Columbia Bank Building,
Kansas City, Missouri,
Attorneys for Defendants named herein.

SEC. 14.

In the District Court of the United States for the Western District of Missouri, Western Division. Edward Vance, Plaintiff, vs. American Society of Composers, Authors and Publishers et al., Defendants. Civil Action No. 4139.

Reply.

Plaintiff, Edward Vance, makes this reply to defendants named herein jointly under Rule 12, (b) of Civil Procedure, and moves the Court to overrule motions of defendants, on the following legal grounds, to wit:

The defendants, American Society of Composers, Authors and Publishers, Deems Taylor, George W. Meyer, Max Dreyfus, Shapiro, Bernstein and Company, Inc., Edwin H. Morris and Company, Inc., Jenkins Music Company, Inc., Music Publishers Protection Association, Maurice J. O'Sullivan, Hudson R. Morton, Martin Meltzer, Dick Howard, Bob Ellsworth, Russ Morgan, Curt Massey, and Arbie Gibson's motions to dismiss amended pleadings, as adopted by reference to former motions are insufficient.

1. Insufficient legal grounds of defense, because defendants plead their state rights when charged jointly of violating a law of the United States.

2. The defendants have no right to say this action shall be several which the plaintiff elects to make joint.

3. The conspiracies as set forth in the complaint are all for one single purpose, to maintain and promote an illegal combination in restraint of interstate trade and commerce, and plaintiff's literary property was taken from him and used by all defendants for that purpose, as alleged in the complaint or otherwise the plaintiff would have gained recognition from defendant Society as the original author.

4. The defendants have abused the liberal provisions provided in Rule 12, (b) of Civil Procedure—

(a) By pleading statute of limitation in their motions to dismiss.

(b) By pleading insufficient process of service and venue, and then plead to the merits of the complaint.

(c) By constantly saying plaintiff failed to comply with Rule 8, e (1).

(d) By claiming plaintiff's pleadings are vexatious, when defendants did not plead to the insufficiency of the complaint in an affirmative manner, and the only objection raised, was that plaintiff failed to comply with Rule 8, e (1) which objection does not give the right to strike the entire complaint, but just that part permitted to Rule 8, e (1) granting the plaintiff the right to amend when defendants point out with particularity insufficiency of that part pertaining to Rule 8, e (1) and no such affirmative pleas were made by defendants.

5. Statute of limitation does not lie against the plaintiff's literary property right, as no right of proprietorship has been transferred to any individual, corporation or association—

C. J. 13. "Common Law Right."

The common law prohibits any kind of unauthorized interference with, or use of an unpublished work on the ground of an exclusive property right, and the common law right is perpetual, existing until lost or terminated by the voluntary act of the owner.

6. Jurisdiction of the subject matter and claim for relief affirmatively appears in the complaint and amended pleadings.

7. The plaintiff effected service of process on four defendants within the State of Missouri, as provided by Rule 4, of Civil Procedure, and Title 28, Section 1, U. S. C. A. Judicial Code 24 Amended, as there is a federal question in controversy, and valid service can be procured on the absent defendants by an order of this court, to that effect when the United States Marshal of the Southern District of New York, returns the petitions and summonses he was unable to serve.

8. The amended pleadings do conform to the evidence and such amendment which in fact is not an amendment but only in name and was added more as a bill of particulars to conform to defendant's pleadings, and is not barred by Rule 15 (a) as amendments can be made at all times when they conform to the evidence.

Wherefore, the plaintiff prays for the motion filed by the defendants named and described herein, be overruled for insufficient legal grounds for defense and that all defendants summonsed in the State of Missouri plead to the allegations in the complaint and amended pleadings which alleges jurisdiction and claim for relief.

Edward Vance,
Plaintiff,
R. 1, Box 191-C,
Independence, Missouri,
Attorney for self.

In the District Court of the United States for the Western District of Missouri. Western Division. Edward Vance, Plaintiff, vs. American Society of Composers, Authors and Publishers et al., Defendants. Civil Action No. 4139.

Memorandum in Support of Reply.

The plaintiff's reply is filed under Rule 12 (b) of Civil Procedure.

1. Rule 12 (b) of Civil Procedure has been abused by defendants, and the tendency is to prevent attorneys from constantly claiming plaintiff failed to comply to Rule 8 e (1) of Civil Procedure. Such pleadings under the rules are the Supreme Court's headache. A more sane and sensible construction is supported by following citations.

Federal District Court was required to construe complaint so as to give averments force and effect if such construction be reasonable. *Mails* v. *Kansas City Public Service Co.*, (D. C. Mo., 1943) 51 Fed. Supp. 562.

General allegation that a conspiracy in restraint of trade directly injured the business and property of the complaining party are sufficient. *Hartford-Empire Co.* v. *Glenshaw Glass Co.*, (D. C. Pa.) 48 Fed. Supp. 203.

Where complaint alleged diversity of citizenship, price discrimination in sales of gasoline in interstate commerce, illegal rebates, discounts terms, allowances and other preferences which resulted in substantial damage to plaintiffs, it sufficiently stated a cause of action within the jurisdiction of a federal court. *Weinberg* v. *Sinclair Refining Co.*, (D. C. N. Y.) 48 Fed. Supp. 203.

Under Federal Rules of Civil Procedure a technical pleading to conform to facts proven is not necessary. *Anderson* v. *Hershey*, (C. C. A. Ky., 1942) 127 F. 2d 884.

The function of the "complaint" is to afford fair notice to adversary of the nature and basis of claim asserted and a general indication of type of litigation involved. *Best Foods* v. *General Mills,* (D. C. Del., 1944) 3 F. R. D. 275.

Complaint to recover damages for combination restraining trade should state generally nature of combination and act injuring plaintiff. *Emich Motor Corporation* v. *General Motors Corporation,* (D. C. Ill., 1943) 2 F. R. D. 552.

Under Federal Rules of Civil Procedure a technical pleading to conform to facts proven is not necessary. *Anderson* v. *Hershey,* (C. C. A. Ky., 1942) 127 F. 2d 884.

The sharp and technical condemnation of pleading that once obtained does not now exist, and, if a complaint states fully and simply a statement of the cause of action, it is sufficient. *Hollander* v. *Davis,* (C. C. A. Fla., 1941) 120 F. 2d 131.

What constitutes a "Short and plain statement" of plaintiff's claim within federal rule providing that plaintiff shall make a short and plain statement of the claim showing that pleader is entitled to relief, must be determined by type of case, the relief sought, situations of parties, and whether it is desirable in obtaining speedy justice that plaintiff state with particularity his alleged claim. *Fleming* v. *Dierks Lumber & Coal Co.,* (D. C. Ark., 1941) 39 F. Supp. 237.

Where the District Court was not put to great effort to ascertain matters on which the federal court's jurisdiction depended, the court would not require plaintiff to amend further because of plaintiff's failure, strictly speaking, to set forth in complaint a short and complete statement of grounds on which the court's jurisdiction depended, as required by subd. (a) (1). *Arndt* v. *Bank of America,* (D. C. Cal., 1943) 48 F. Supp. 961.

The Federal Rule of Civil Procedure that pleadings shall be so construed as to do substantial justice

excludes requiring technical exactness, or the making refined inferences against the pleader, and requires an effort fairly to understand what he attempts to set forth. *De Loach* v. *Crowley's, Inc.*, (C. C. A. Fla., 1942) 128 F. 2d 378; *Victory* v. *Maning*, (C. C. A. N. J., 1942) 128 F. 2d 415.

In action to enjoin activities of conspiracy in restraint of trade, complaint charging agreements between defendants of a nature condemned by Anti-Trust Acts, with sufficient particularity to enable defendants to answer, was sufficient without setting forth circumstances from which conclusions in complaint were drawn. *U. S.* v. *Johns-Manville*, (D. C. Ill., 1941) 1 F. R. D. 548.

Cases supporting liberal construction of the Federal Rules include the following: *Phillips* v. *Baker*, (C. C. A. Cal., 1941) 121 F. 2d 752, certiorari denied 62 S. Ct. 301, 314 U. S. 688, 86 L. Ed. 551; *John R. Alley & Co.* v. *Federal Nat. Bank of Shawnee, Shawnee County, Okla.*, (C. C. A. Okla., 1942) 124 F. 2d 995; *Saxton* v. *W. S. Askew Co.*, (D. C. Ga., 1941) 38 F. Supp. 323; *Smith* v. *Employers Fire Ins. Co.*, (D. C. Ill., 1940) 1 F. R. D. 251; *Schram* v. *O'Connor*, (D. C. Mich., 1942) 2 F. R. D. 192; *French* v. *Zalstem-Zalesky*, (D. C. N. Y., 1942) 1 F. R. D. 508; *U. S.* v. *Crescent Amusement Co.*, (D. C. Tenn., 1940) 31 F. Supp. 730.

2. This court has jurisdiction over the subject matter because the complaint affirmatively alleges such in plain language and also shows plaintiff is entitled to relief.

3. The defendants rely upon Rules of Civil Procedure to enlarge their power as litigants and to prejudice the plaintiff before the Court by irregular anomalous, dilatory impertinence and innuendo, seeking to avoid a federal question. All such pleading shows insufficient grounds for defense. Some of defendants refer to the complaint as

being luminous while other defendants referred to the complaint as being vague. Any school boy could understand what the charges are in the complaint.

4. There is no indication of this being a private suit.

5. Questions involving rules of Civil Procedure should not be forced on Supreme Court for review.

6. The defendants falsely stated that plaintiff alleges copyright infringements. The plaintiff had no copyright.

7. Plaintiff asks for fair consideration of the rules.

Respectfully submitted,

Edward Vance,
Plaintiff,
R. 1, Box 191-C,
Independence, Missouri,
Attorney for self.

The plaintiff has mailed 16 true copies of above reply this day July 25, 1946, for all defendants addressed to the attorneys of record.

Edward Vance,
Plaintiff,
R. 1, Box 191-C,
Independence, Missouri,
Attorney for self.

SEC. 15.

In the District Court of the United States for the Western District of Missouri, Western Division. Edward Vance, Plaintiff, vs. American Society of Composers, Authors and Publishers, et al., Defendants. Civil Action No. 4139.

Motion for Court Order for Service on Agency.

AFFIDAVIT

State of Missouri, County of Jackson, ss:

Edward Vance being first duly sworn says:

1. That he is the plaintiff in the above titled cause.

2. This action arises under the act of July 2, 1890, and the act of October 15, 1914 (U. S. C. A., Title 15, Secs. 1-15), and is to enforce and restrain an illegal combination and conspiracy in restraint of interstate trade and commerce, and that valid service of process has been effected under Rule 4 of Federal Procedure on the following named defendants: Jenkins Music Company, Inc., 1217 Walnut Street, Kansas City, Missouri, Maurice J. O'Sullivan, 921 Walnut Street, Kansas City, Missouri, Hudson R. Morton, 4540 Olive Street, Kansas City, Missouri, and under Title 28, Judicial Code 24 Amended valid service was effected on Martin Meltzer, 3615 Olive Street, St. Louis, Missouri.

3. Pursuant to Rule 17 (b) of Federal Procedure and Statutory Titles cited above: The plaintiff moves the court for an order directing Maurice J. O'Sullivan, defendant in this action, to appear, plead or answer herein. Why the following named defendants can not have valid service of process effected through him or show proof why he does not have the capacity to sue or be sued for the purpose of enforcing for or against defendant Society, or

all related defendants acting in their respective official capacity as members or representatives of defendant Society, a substantive right existing under the laws of the United States. The absent defendants: American Society of Composers, Authors and Publishers, Deems Taylor, George W. Meyer, Max Dreyfus, 30 Rockefeller Plaza, New York City, Shapiro, Bernstein and Company, Inc., 1270 Sixth Avenue, New York City, Edwin H. Morris and Co., Inc., 1619 Broadway, New York City, Music Publishers Protective Association, 45 Rockefeller Plaza, New York City, Dick Howard, Bob Ellsworth, Russ Morgan, Curt Massey, Arbie Gibson, care of Ascap 30 Rockefeller Plaza, New York City. Or furnish information as to whereabout service can be made through a representative for the following legal grounds to wit:

Defendant Society issues pamphlets and mails them every three months to music users in the Western District of Missouri. Among other things these pamphlets contain the following:

> If there were no such central agency or clearing house, it would be necessary for each user to negotiate and deal separately for licenses with each individual copyright owner whose works were to be thus used, in order to perform the same lawfully and avoid the commission of infringements.
>
> The license of the Society is available to all users of music in public performances for profit upon relatively equal terms and conditions. Every effort will be made by the Society at all times in the future, as in the past, to increase the content of the repertoire to the end that the same afford a maximum service to our licensees.
>
> We stand ready at all times to promptly answer all inquiries, and in every consistent manner to make our service as inclusive, as prompt and as valuable to our licensees as it is possible for us to do.

For the convenience of users, branch offices of the Society or representatives are maintained in key cities throughout the entire country. A list of such offices with the names and addresses of representatives will be found in the following pages. Please do not hesitate to call upon this office directly, or upon any of our district or branch offices, for any information or assistance on questions involving copyright ownership or conditions.

It is our hope that the repertoire of the society may at all times serve the most exacting requirements of your business.

Defendant Society carries its commonly known title "ASCAP" on the building directory board of the Columbia National Bank Building, address 700 7th floor, 921 Walnut Street, Kansas City, Missouri, and does maintain a district office there. The defendants, Maurice J. O'Sullivan and Hudson R. Morton, have the power of solicitation and do transact business for defendant Society and by law can sue or be sued to enforce any substantive right of defendant society and its members under the laws of the United States.

4. The plaintiff for the purpose of notification, speedy and economical delivery, had the United States Marshal for the Southern District of New York to serve the absent defendants named herein. The record of the absent defendants' pleadings shows that they refuse to willingly join the suit. The Marshal's return shows six defendants not being served but all have pleaded in motion to dismiss.

Subscribed and sworn to before me this 27th day of July, 1946.

My commission expires November 25, 1946.

Setta H. Reed,
Notary Public.
(Seal)

Edward Vance,
Plaintiff,
R. 1, Box 191-C,
Independence, Missouri,
Attorney for self.

EXHIBIT B.

SEC. 16.

In the District Court of the United States for the Western District of Missouri, Western Division. Edward Vance, Plaintiff vs. American Society of Composers, Authors and Publishers et al., Defendants. No. 4139.

Order.

The several motions of the defendants herein, to dismiss this cause, should be sustained.

Plaintiff has not complied with the order of this Court heretofore entered on June 19, 1946, commanding plaintiff to comply with *Rule 8 of the F. R. C. P.*, in stating his alleged cause of action against the defendants.

On the face of the amended pleadings it is revealed that this Court does not have jurisdiction of the cause of action attempted to be stated by plaintiff under the Sherman Anti-Trust Act or the Clayton Act.

No facts are alleged in said amended pleadings, stating any claim against any of the defendants upon which relief could be granted by this Court.

For failure of plaintiff to comply with the previous order of this Court:

It Is Therefore Ordered and Decreed by the Court that this cause be, and the same is hereby dismissed.

/s/ Albert A. Ridge,
Judge.

Dated at Kansas City, Missouri, this 9th day of October, 1946.

SEC. 17.

In the District Court of the United States for the Western District of Missouri, Western Division. Edward Vance, Plaintiff vs. American Society of Composers, Authors and Publishers et al., Defendants. Civil Action No. 4139.

Motion for Review of Complaint and to Vacate Court Order.

1. Edward Vance, plaintiff, in the above titled cause, pursuant to rule 59 (a) of federal procedure and the Act of Congress, June 19, 1934, Chapter 651 (48 Stat. 1064), U. S. C. Title 28, Secs. 723b, 723c, moves the Court to review the plaintiff's Complaint and amended pleadings, and vacate the orders of the Court, issued June 19, 1946, and October 9, 1946, respectively. Both said orders are erroneous on the following legal grounds.

2. The two said orders are inconsistent with substantial justice.

3. The Court's orders are errors in law, obstructing and impeding justice. They prejudice the plaintiff, restraining the plaintiff's common liberty.

4. The Court has made an error by dismissing the plaintiff's Complaint.

5. The rulings of the Court makes rule 8, of federal procedure annul all other rules of federal procedure. The defendants had no legal defense and they relied on rule 8, as a means to an end. The said orders enlarge the defendants' power as litigants in violation of the Act of Congress, June 19, 1934, Chapter 651 (48 Stat. 1064), U. S. C. Title 28, Sec. 723 b, 723 c, which reads as follows: Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant.

6. The Court was informed of the existence of facts in the plaintiff's complaint, but draws erroneous conclusions of law.

7. The erroneous conclusions drawn by the Court of the plaintiff's complaint under the federal rules are: (a) That the plaintiff must have a certain theory to effect suit under the Anti-Trust Laws; (b) That the plaintiff must state a cause of action; (c) That the pleadings are for the purpose of framing issues, and preparing the controversy for trial; (d) That this case is complicated.

8. The Court order issued June 19, 1946, with personal reference to the plaintiff's ability to draw his own briefs is impertinence. The order infringes on the rules of federal procedure. It was not drawn up in an affirmative manner to comply with federal rules or such statements would have been omitted. The said order was prejudicial. The Court may refer to paragraph 4, of plaintiff's reply to understand the defendants' infringement of federal rules, plus four papers filed by two attorneys of long practice in this court, which contained no captions.

9. The motion Judge's error was that he did not consider the plaintiff's complaint and amended pleadings as a whole. The allegations in the amended pleadings was titled "Jurisdiction and claim for relief." The plain-

tiff attempted only to show the Court's authority and the plaintiff's casual connection with the alleged combination and conspiracy, which, complied with the court order and conformed with the defendant's pleadings, and also, re-affirmed facts of the complaint.

10. The plaintiff affirms that he met all requirements of rule 8, of federal procedure in his complaint.

Wherefore, the plaintiff prays that the Court review the plaintiff's complaint and amended pleadings and vacate the two court orders and set them aside.

Edward Vance,
Plaintiff,
R. 1, Box 191-C,
Independence, Missouri,
Attorney for self.

In the District Court of the United States for the Western District of Missouri, Western Division. Edward Vance, Plaintiff, vs. American Society of Composers, Authors and Publishers, et al., Defendants. Civil Action No. 4139.

Memorandum Supporting Motion to Review Pleadings and Vacate Court Orders.

The plaintiff's motion is filed under rule 59 (a) of federal procedure and the Act of Congress, June 19, 1934. Chapter 651 (48 Stat. 1064). U. S. C. Title 28, Sec. 723 b, 723 c.

1. The only requirement of the federal rules are that the complaint be so constructed to be understood so the Court and the defendants will know the nature of the controversy.

Citations:

"Title 28, Sec. 41, Subd. (1) necessity of showing jurisdictional facts. Jurisdiction of federal court is determined by allegations of the bill. *Hillsborough Tp., Somerset County, N. J.*, v. *Cromwell*, (N. J., 1946) 66 S. Ct. 445, 90 L. Ed."

"Determination of question of jurisdiction. Whether the complaint states a cause of action on which relief can be granted is a question of law and just as issues of fact. It must be decided after and not before the court has assumed jurisdiction over the controversy. *Bill* v. *Hood*, (Cal., 1946) 66 S. Ct. 773, 90 L. Ed."

"The modern philosophy concerning pleadings is that they do little more than indicate generally the type of litigation that is involved, and a generalized summary of the case that affords fair notice is all that is required. *Securities and Exchange Commission* v. *Timetrust, Inc.*, (D. C. Cal., 1939) 28 F. Supp. 34."

2. The demands and suggestions in The Court Order issued June 19, 1946, directed to the plaintiff were without reason, principle or any just cause, and not warranted under federal rules.

Citations:

"These rules have the same effect as a statute and are as binding upon the court as upon counsel. *Barrezueta* v. *Sword S. S. Line*, (D. C. N. Y., 1939) 27 F. Supp. 935; *McCrate* v. *Morgan Packing Co.*, (D. C. Ohio, 1939) 26 F. Supp. 812."

"Only too frequently in the past have procedural rules been regarded as ends in themselves upon whose rigid altar has ultimate justice been sacrificed. Having been presented with a brief simple set of rules of procedure, they should be construed as avenues to justice and not dead end streets without directions or purpose. *Laverett* v. *Continental Briar Pipe Co.*, (D. C. N. Y., 1938) 25 F. Supp. 80."

3. The plaintiff demands fair consideration of the federal rules which are the basic facts of this appeal for review.

Respectfully submitted,

Edward Vance,
Plaintiff,
R. 1, Box 191-C,
Independence, Missouri,
Phone In. 3560 J,
Attorney for self.

16 true copies of this motion have been mailed this day, October 14, 1946, to attorneys of record for defendant to the addresses in the records.

Edward Vance,
Plaintiff,
R. 1, Box 191-C,
Independence, Missouri,
Attorney for self.

EXHIBIT C.

SEC. 18.

In the District Court of the United States for the Western District of Missouri, Western Division. Edward Vance, Plaintiff, vs. American Society of Composers, Authors and Publishers et al., Defendants. No. 4139.

Order.

Now on this day plaintiff's motion for review and to vacate order of the Court, dismissing this cause, is, by the Court, overruled.

/s/ Albert A. Ridge,
Judge.

Dated at Kansas City, Missouri, this 29th day of October, 1946.

EXHIBIT D.

SEC. 19.

In the District Court of the United States for the Western District of Missouri, Western Division. Edward Vance, Plaintiff, -vs- American Society of Composers, Authors and Publishers et al., Defendants. Civil Action No. 4139.

Order.

Now on this day the petition of Edward Vance, plaintiff in the above entitled cause, for a direct appeal to the Supreme Court of the United States from the final judgment of this Court dismissing plaintiff's complaint for failure of plaintiff to allege therein facts establishing the jurisdiction and venue of this court, and to comply with Rule 8, Rules of Civil Procedure, is hereby denied. An appeal from such judgment of this District Court direct to the Supreme Court of the United States is not permitted by law.

Albert A. Ridge,
Judge.

Dated at Kansas City, Missouri, this 7th day of November, 1946.

SEC. 20.

In the District Court of the United States for the Western District of Missouri, Western Division. Edward Vance, Plaintiff, vs. American Society of Composers, Authors and Publishers et al., Defendants. Civil Action No. 4139.

Notice of Appeal to Circuit Court of Appeals Pending on Decision of Petition for Writ of Certiorari, Filed with Supreme Court of the United States of America.

Notice is hereby given that Edward Vance, plaintiff above named, hereby appeals to the Circuit Court of Appeals for the Eighth Circuit from the Court Order entered by the District Court, on the 29th day of October, 1946, which said notice is pending on the decision of the Supreme Court, of the United States of America, on Petition for Writ of Certiorari.

Within time allowed by law the plaintiff following decision of the Supreme Court will furnish sufficient bond and security to the District Court, should judgment of the Supreme Court be against plaintiff.

Filed November 8, 1946.

Copies of this notice were mailed by plaintiff this day to attorneys of record.

Edward Vance,
Plaintiff,
R. 1, Box 191-C,
Independence, Missouri,
Attorney for self.

No. 771

FILED
DEC 30 1946
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1946

EDWARD VANCE,

Appellant,

against

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, *et al.*,

Appellees.

BRIEF ON BEHALF OF CERTAIN APPELLEES APPEARING SPECIALLY ON THE MOTION TO DISMISS MADE BELOW, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, WESTERN DIVISION

MAURICE J. O'SULLIVAN,
JOHN C. KILLIGER, JR.,
Attorneys for Defendants-Appellees, named herein, appearing specially in opposition to petition for a writ of certiorari.

LOUIS D. FROHLICH,
HERMAN FINKELSTEIN,
LAWRENCE C. GIBBS,
of Counsel.

APPELLATE LAW PRINTERS, NEW YORK CITY

IN THE

Supreme Court of the United States

October Term, 1946

EDWARD VANCE,

Appellant,

against

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, *et al.*,

Appellees.

BRIEF ON BEHALF OF CERTAIN APPELLEES

Preliminary Statement

This action is purportedly brought under the Sherman Anti-Trust Act (Pet., pp. 14-15).

Plaintiff-appellant petitions this Court to review directly two orders of the United States District Court for the Western District of Missouri, Western Division, dated October 9, 1946 and October 29, 1946, respectively (Pet., p. 6). The first of these orders dismissed the amended complaint herein (Pet., p. 99). The second of these orders denied plaintiff's application to review and vacate the order dismissing the complaint (Pet., p. 104).

Plaintiff's application in the District Court for leave to appeal directly to this Court was denied on November 7, 1946 on the ground that such direct appeal was "not permitted by law" (Pet., p. 105).

The History of the Action

This action was instituted by the filing of a complaint in the United States District Court for the Western District of Missouri, Western Division, on May 15, 1946 (Pet., pp. 14-42). Three similar actions previously instituted by plaintiff against the same defendants had been dismissed (Pet., p. 50).

On June 7, 1946, appellees herein, together with certain of the other defendants, appeared specially and moved for an order dismissing the complaint on various grounds set forth in the notice of motion (Pet., pp. 49-58). The motion to dismiss was granted by District Judge Collett on June 19, 1946, with leave to plaintiff to amend his complaint "to comply with Rule 8" (Pet., pp. 61-63).

On June 25, 1946, plaintiff served a document which he entitled an "amended complaint" (Pet., pp. 63-66). Appellees herein again appeared specially and moved "to quash the returns of service upon them and to dismiss the amended complaint" (Pet., pp. 73-75). Before any decision was rendered on that motion, plaintiff served a second amended pleading (Pet., pp. 78-80).

Once again, appellees herein appeared specially and made a motion "to quash the returns of service upon them and to dismiss the amended complaint" (Pet., pp. 87-89).

On October 9, 1946, District Judge Ridge granted the motion to dismiss on the ground that plaintiff had "not complied with the order of this Court heretofore entered on June 19, 1946, commanding plaintiff to comply with Rule 8 of the F.R.C.P." (Pet., p. 99). The order of dismissal was based upon the further grounds that, on the face of the amended pleadings, it was disclosed that "this

Court does not have jurisdiction of the cause of action attempted to be stated" and that "no facts [were] alleged in said amended pleadings stating any claim against any of the defendants upon which relief could be granted" (Pet., pp. 99-100).

On October 14, 1946, plaintiff moved to review the amended pleadings and to vacate the orders dated June 19, 1946 and October 9, 1946, respectively (Pet., pp. 100-104). That motion was denied by District Judge Ridge on October 29, 1946 (Pet., p. 104).

Plaintiff then moved in the District Court for leave to appeal directly to this Court. Prior to any disposition of that motion, and on November 6, 1946, plaintiff made the instant application directly to this Court for a writ of certiorari (Pet., pp. 6-7).

District Judge Ridge denied plaintiff's motion for a direct appeal on November 7, 1946, holding that such an appeal was "not permitted by law" (Pet., p. 105).

On the following day, plaintiff served a notice of appeal to the Circuit Court of Appeals for the Eighth Circuit from the order dated October 29, 1946 (Pet., p. 106). That appeal has since been withdrawn.

Appellees' Contention

The appellees herein base their opposition to the granting of plaintiff's petition for a writ of certiorari on the grounds that:

(1) An appeal directly from a District Court to the Supreme Court may not be taken in an anti-trust suit unless

the United States is the complainant and a *final* decree has been made in the District Court (§29, Title 15, U. S. C.); and

(2) This Court is without jurisdiction to issue a writ of certiorari inasmuch as the action has not been "in" a Circuit Court of Appeals or in the Court of Appeals of the District of Columbia (§347, Title 28, U. S. C.).

POINT I

This Court is without jurisdiction to hear the instant application. The petition must therefore be dismissed.

Inasmuch as the complaint purports to allege a cause of action under the Sherman and Clayton Anti-Trust Acts, it is pertinent to note Section 29, of Title 15, U. S. C., to the extent that provision is therein made for an appeal directly to the Supreme Court from a District Court. This section provides as follows:

> "In every suit in equity brought in any district court of the United States under sections 1-7 or 15 of this title, *wherein the United States is complainant*, an appeal from the *final* decree of the district court will lie only to the Supreme Court and must be taken within sixty days from the entry thereof."

Thus, it is apparent that only in an anti-trust suit wherein the United States is the complainant may an appeal from a *final* decree of the District Court be taken directly to this Court. *Columbia Gas Co.* v. *Amer. Fuel and Power Co. et al.*, 322 U. S. 379, 384 (1943).

The circumstances under which an application for certiorari may generally be made by a litigant is set forth in Section 347, Title 28, U. S. C. That section provides as follows:

> "In any case, civil or criminal, in a circuit court of appeals, or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal."
>
> * * *
>
> "No judgment or decree of a circuit court of appeals or of the Court of Appeals of the District of Columbia shall be subject to review by the Supreme Court otherwise than as provided in this section."

Thus, an application for a writ of certiorari is proper where a case has been reviewed either in the Circuit Court of Appeals, or in the Court of Appeals of the District of Columbia, *but not otherwise*. *House* v. *Mayo*, 324 U. S. 42, 44 (1944).

Inasmuch as an order sustaining a demurrer is not a final order within the meaning of the Judicial Code (28 U. S. C. §225), an appeal therefrom would not even lie in the Circuit Court of Appeals. *Dye, et al.* v. *Farm Mortgage Inv. Co. of Topeka, Kan.*, 70 Fed. [2d] 514, 515 (C. C. A. 10, 1934).

There not having been any final judgment entered below, this Court has no jurisdiction to issue a writ of certiorari. The petition must therefore be dismissed. *Louisiana Nav. Co.* v. *Oyster Commission*, 226 U. S. 99, 101 (1912); *Missouri & Kansas Interurban Railway Company* v. *City of Olathe, Kansas*, 222 U. S. 185, 186 (1911).

CONCLUSION

In the light of the foregoing, it is respectfully submitted that the petition for a writ of certiorari to the District Court, be in all respects denied.

MAURICE J. O'SULLIVAN,
JOHN C. KILLIGER, JR.,
Attorneys for Defendants-Appellees, American Society of Composers, Authors and Publishers, Deems Taylor, George W. Meyer, Max Dreyfus, Shapiro, Bernstein and Co. Inc., Edwin H. Morris and Co., Inc., Martin Meltzer, Dick Howard, Bob Ellsworth, Russ Morgan, Curt Massey and Arbie Gibson, appearing specially in opposition to petition for a writ of certiorari.

LOUIS D. FROHLICH,
HERMAN FINKELSTEIN,
LAWRENCE C. GIBBS,
of Counsel.

FILE COPY

Office - Supreme Court, U. S.
FILED
DEC 30 1946
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 771.

EDWARD VANCE, APPELLANT,

VS.

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS ET AL., APPELLEES.

BRIEF OF MUSIC PUBLISHER'S PROTECTIVE ASSOCIATION IN OPPOSITION TO THE ISSUANCE OF WRIT OF CERTIORARI.

T. JAMES CONWAY,
HENRY ARTHUR,
700 Columbia Bank Building,
Kansas City, Missouri,
Attorneys for Music Publisher's Protective Association.

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 771.

EDWARD VANCE, APPELLANT,

VS.

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS ET AL., APPELLEES.

BRIEF OF MUSIC PUBLISHER'S PROTECTIVE ASSOCIATION IN OPPOSITION TO THE ISSUANCE OF WRIT OF CERTIORARI.

The Petition for Writ of Certiorari repeats the confusion in pleadings that has constantly existed in this cause. Edward Vance filed a complaint in the District Court of the United States for the Western District of Missouri which petition was attacked by Motion to Dismiss for the reason, among others, that it did not comply with Rule 8 of the Federal Rules of Civil Procedure. The District Court sustained the motion on that ground. Alleged

amended pleadings were filed; similar motions were filed attacking these pleadings not only for the failure to comply with Rule 8 but because they failed to show that the Court had jurisdiction of the cause of action attempted to be stated, and because the pleadings did not state a claim against any of the defendants upon which relief could be granted. These motions were sustained on all three grounds. The Plaintiff below then filed "Motion for Review of the Complaint and to Vacate Court Order" which was overruled. Application for direct appeal to this Court was denied. This Petition for Writ of Certiorari to the District Court of the United States for the Western District of Missouri was filed. Also Plaintiff filed notice of appeal to the Circuit Court of Appeals for the Eighth Circuit, which notice has since been withdrawn.

It is hard to determine what the pleader is intending to say. It is apparent one thing complained of is the lower court's holding (1) that the Plaintiff must have a certain theory to effect suit under the Anti-Trust Laws, (2) that the Plaintiff must state a cause of action, and (3) that the pleadings are for the purpose of framing issues and preparing the controversy for trial.

Section 238 of the Judicial Code (U. S. C. A., Title 28, Sec. 345) is as follows:

> "345. (Judicial Code, Section 238.) Appellate Jurisdiction from Decrees of United States District Courts. A direct review by the Supreme Court of an interlocutory or final judgment or decree of a district court may be had where it is so provided in the following sections or parts of sections and not otherwise:
>
> (1) Section 29 of Title 15, and Section 45 of Title 49.
>
> (2) Section 682 of Title 18, where the decision of the district court is adverse to the United States.

(3) Section 380 of this title.

(4) So much of Sections 47 and 47a of this title as relates to the review of interlocutory and final judgments and decrees in suits to enforce, suspend, or set aside orders of the Interstate Commerce Commission other than for the payment of money.

(5) Section 217 of Title 7."

In the case of *United States* v. *Belt*, 1943, 63 S. Ct. 1278, 319 U. S. 521, 87 L. Ed. 1559, it was stated "the dominating policy of the 1925 Amendment to this Section was to restrict direct review to the Supreme Court as a matter of right, and more particularly to shut off such direct review of judgments of Federal *nisi prius* Courts." This was a case in which the United States was seeking to appeal directly from the Supreme Court of the District of Columbia to the Supreme Court of the United States, under authority of Section 5 of the Act of April 27, 1912 (37 Stat. 93, Ch. 96), authorizing suits for the purpose of clearing title to certain lands of the United States in the District of Columbia. The Supreme Court held that the section mentioned above was impliedly repealed by the provisions of the Act of February 13, 1925 (43 Stat. 936, 28 U. S. C., Sec. 345), permitting direct review by the Supreme Court of the judgments of Federal District Courts in only five specified categories "and not otherwise," although the Supreme Court of the District of Columbia did not become a District Court in name until the Act of June 25, 1936 (49 Stat. 1921, Ch. 804).

The Appellant's cause of action certainly does not fall in any of the five categories mentioned in this section.

The Appellant seems to rely on Title 28, Sec. 380a, U. S. C. A., but this section is clearly confined to cases in which the constitutionality of a Federal Statute is in

question. Nowhere in Appellant's Brief is there any complaint about the unconstitutionality of Section 8 of the Federal Rules of Procedure because of which his Petition was dismissed. Section 380a is confined to cases in which an injunction is sought to stop the application of a Federal Statute which the Plaintiff claims is unconstitutional. Since this remedy is a very powerful one, the Judicial Code very carefully provides that:

> "No interlocutory or permanent injunction suspending or restraining the enforcement, operation, or execution of, or setting aside, in whole or in part, any Act of Congress upon the ground that such Act or any part thereof is repugnant to the Constitution of the United States shall be issued or granted by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, unless the application for the same shall be presented to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a circuit judge * * *"

The present cause of action does not even remotely resemble the cases provided for in this section. As clearly as can be determined, the present suit is one for damages for conspiracy. When Appellant in three tries failed to state a cause of action under Section 8 of the Federal Rules of Procedure his case was dismissed and now he seeks to enjoin the application of the statute under which his cause of action was dismissed. Every litigant would like to enjoin the rules under which his cause of action is defeated, but this is obviously impossible.

There can be no Writ of Certiorari from the Supreme Court of the United States to the District Court of the United States for the Western District of Missouri in this cause as *Section 237 of the Judicial Code*, as amended by the Acts of January 31, 1928, Ch. 14, Sec. 1, 45 Stat. 54,

U. S. C. A., Title 28, Sec. 344, does not authorize the issuance of Writ of Certiorari in this character of case.

Since there is no authority under which the Writ of Certiorari can be issued there is no need to discuss any of the specific errors urged other than to say that a mere reading of the pleadings will show the accuracy of the ruling of the District Court.

Wherefore, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

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